

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

BETTY ANN MARSEE,)
Administratrix of the Estate)
of MARVIN SEAN MARSEE,)
Deceased,)

Plaintiff,)

vs.) No. Civ-84-2777R

UNITED STATES TOBACCO CO.,)
a New Jersey corporation,)

Defendant.)

TRANSCRIPT OF JURY TRIAL PROCEEDINGS
Tuesday, June 10, 1986

A p p e a r a n c e s :

HON. DAVID L. RUSSELL,
U.S. District Judge, Presiding

GEORGE W. BRALY, Esquire
DANIA DESCHAMPS-BRALY, Esquire
Braly & Braly
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Appeared for Plaintiff.

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and

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Appeared for Defendant.

Volume 26

1
2 Maynard E. Peterson, CSR
3 Acting Official Reporter
4

5 BE IT REMEMBERED, that on the 10th day of
6 June, 1986, the above matter coming on for jury trial
7 before the Honorable David L. Russell, United States
8 District Judge for the Western District of Oklahoma,
9 and the parties appearing in person and or by counsel
10 as hereinabove set forth, the following proceedings
11 were had:

12 THE COURT: Be seated.

13 Go ahead, Mr. Braly.

14 MR. BRALY: We shall continue with the
15 chairman of the board, Your Honor.

16 (The videotape deposition of Louis F. Bantle was
17 here continued.)

18 Q. Do you call that the kind of research effort
19 that is consistent with the statement that people's
20 health was paramount to every other consideration in
21 your business?

22 MR. JENNINGS: Object to the question as
23 argumentative.

24 MR. BRALY: Would you read the question
25 back, and noting counsel's objection, I would ask

1 that I get an answer.

2 (The preceding question was here read by the
3 court reporter.)

4 Q. (BY MR. BRALY) Did you understand the
5 question, Mr. Bantle?

6 A. Yes, sir.

7 Q. And do you believe that the expenditure of
8 the sum of \$9,613 in 1975 and \$17,250 in 1976 is an
9 effort -- or scientific investigative effort that was
10 commensurate with this problem that your research
11 director described?

12 A. Mr. Braly, we were part of the Tobacco
13 Industry Research Committee, and that committee was
14 spending, I am sure -- I am not sure of the exact
15 figures, but I know they were spending much more
16 money than you have mentioned. That was only the
17 part that they asked us to contribute to it.

18 Q. So you are telling us then that you didn't
19 do any independent research. That you relied on some
20 trade association?

21 A. That is not a trade association, sir. It's a
22 research committee of the tobacco industry that
23 formed in 1974 and became the Committee for Tobacco
24 Research at some later date.

25 Q. Did U.S. Tobacco Company ask them to conduct

1 any research in connection with norniconitrosamine?

2 A. I'm not aware of whether we did or didn't,
3 sir.

4 Q. So you don't know whether you did or not
5 then, do you?

6 A. Not specifically.

7 Q. But, in any event, the only research that
8 the U.S. Tobacco Company paid for in those two years
9 was \$9,000 in 1975 and \$17,000 in 1976?

10 MR. JENNINGS: May I see what you are
11 reading from, Mr. Braly?

12 MR. BRALY: I am just reading from your
13 answers to Interrogatory 15.

14 MR. JENNINGS: I would like to see what it
15 says.

16 MR. BRALY: Well, it's my work product.
17 It's got my own notes on it, Mr. Jennings. You will
18 have to excuse me. I don't have an unannotated
19 edition with me.

20 MR. JENNINGS: Okay. Will you read to me
21 the entire question --

22 MR. BRALY: Sure.

23 MR. JENNINGS: -- and entire answer that you
24 are reading from --

25 MR. BRALY: Sure will.

1 MR. JENNINGS: -- without your annotation?

2 MR. BRALY: Sure. "Interrogatory 15. In
3 connection with research or studies relating to the
4 safety or lack thereof of the use by the public of
5 your smokeless tobacco products, state how much
6 money, if any, you spent in each of the last 10 years
7 with respect to any such research or studies whether
8 conducted by you or persons acting on your behalf or
9 persons for whom you have provided funds in whole or
10 in part."

11 And the answer was, I believe it was an
12 answer provided on May the 9th, 1985, that for 1975
13 there was \$9,613 and \$17,250.

14 MR. JENNINGS: Is that otherwise qualified
15 in any way?

16 MR. BRALY: No, sir.

17 MR. JENNINGS: Thank you.

18 MR. BRALY: The answer was: "Defendant has
19 funded scientific research in the following amounts
20 over the last 10 years."

21 MR. JENNINGS: Thank you.

22 Q. (BY MR. BRALY) Who is Doctor Manning?

23 A. Doctor Richard Manning is in charge of our
24 Research Department.

25 Q. And he has been with the company for how

1 long?

2 A. I couldn't tell you the exact date, but I
3 believe he has been there ever since I have.

4 Q. Mr. Bantle, in response to this news about
5 these carcinogenic nitrosamines being found in your
6 snuff products, your company did not put any warnings
7 on those products to alert the consumers to that
8 fact, did you?

9 A. No, sir.

10 Q. Mr. Bantle, in response to another
11 interrogatory, Interrogatory No. 12, your response
12 has been filed under oath in this case is that you
13 have never placed any warnings on your smokeless
14 tobacco products. Is that correct?

15 A. In the United States?

16 Q. Let me read you the question.

17 A. Uh-huh.

18 Q. "Have you ever considered placing a warning
19 in the packaging or labeling of your smokeless
20 tobacco products, which warning would have as its
21 subject matter possible health risks to users of your
22 smokeless tobacco products?"

23 The answer was: "No warning has been placed
24 on its smokeless tobacco products because defendant
25 believes that a warning is not warranted."

1 Do you stand by that answer?

2 A. No, sir.

3 Q. You don't stand by that answer?

4 A. No, sir.

5 Q. That answer is false then?

6 A. It has an incorrect -- it should have stated
7 "in the United States."

8 MR. BRALY: Your Honor, can we approach the
9 bench one moment?

10 (The following proceedings were had AT THE SIDE
11 BAR.)

12 MR. BRALY: There follows a colloquy by Mr.
13 Jennings which is on Page 147, which I object to
14 being read to the jury. It is inaccurate; it is
15 incorrect.

16 MR. FINNEGAN: Here it is.

17 MR. JENNINGS: I know where it is at. I
18 don't consider it to be inaccurate or incorrect.

19 THE COURT: What is inaccurate?

20 MR. BRALY: Well, the interrogatory answer
21 was filed the first week or ten days of February of
22 1985, and there was no court order in effect at that
23 time of any kind, and the answer was a
24 straightforward question and asked for a
25 straightforward answer, and the answer that the

1 company gave was false. There just simply was no
2 qualification on limitation outstanding at that time
3 that they gave that answer. And Mr. Jennings'
4 argument and interjection is nothing more than
5 testimony on his behalf.

6 We hadn't even had the first meeting with
7 the Court yet, much less met with the Court or
8 Magistrate or anybody else when that answer was
9 filed.

10 MR. JENNINGS: If the Court please, I don't
11 remember the time sequence. When was the answer
12 filed?

13 MR. BRALY: February the 6th of '85,
14 something like that. It was in February of '85.

15 MR. FINNEGAN: I'd have to check back. It's
16 my recollection that in some of the general -- in
17 some of the qualifications we objected at the outset
18 to going into international matters, and I think that
19 our answers were qualified as given as pertaining to
20 domestic, but I would have to check back.

21 MR. JENNINGS: I think that's correct.

22 MR. FINNEGAN: We objected to going into any
23 matters international, and all of our answers were
24 answered as to domestic.

25 THE COURT: Well, I don't know. I'm not

1 sure it is worth going to and looking up. If you
2 think it is, we will.

3 MR. BRALY: I don't want it read to the
4 jury, because I believe it to be inaccurate and
5 misleading to the jury. I believe the company at
6 that time intended to deceive us with respect to
7 their actions on warnings by their answers.

8 MR. FINNEGAN: Oh, --

9 THE COURT: Well, if you want to take the
10 time to look up whether or not it was limited, we can
11 do it.

12 MR. BRALY: Okay, I would like to have it
13 looked up.

14 THE COURT: Let's do. Where would that --
15 do we have it here?

16 MR. FINNEGAN: I'm sure we do. We have
17 everything.

18 MR. BRALY: That was something they could
19 have covered on cross-examination.

20 MR. JENNINGS: If the Court please, our copy
21 is not complete. Part of it appears to have been cut
22 off, what we said, unless otherwise indicated that
23 our answers were limited to Copenhagen brand of
24 snuff. Copenhagen brand of snuff is not sold in
25 Sweden.

1 THE COURT: I thought that can was
2 Copenhagen.

3 MR. FINNEGAN: That was Skoal, --

4 MR. JENNINGS: Skoal.

5 MR. FINNEGAN: -- Your Honor.

6 MR. JENNINGS: That was Skoal.

7 MR. BRALY: It says "otherwise indicated,"
8 said "products" plural, and the plural was used. The
9 singular was not used.

10 THE COURT: Well, this objection that was
11 made is not correct.

12 MR. JENNINGS: You are right, sir.

13 THE COURT: That was because that had not
14 been done at the time that was answered, so I am
15 going to sustain the objection. Just strike that
16 from the deposition.

17 MR. BRALY: About three places where he
18 brings it up.

19 THE COURT: That's fine.

20 (The following proceedings were had IN OPEN
21 COURT.)

22 Q. At any rate, you have now, you are telling
23 the jury, placed warnings on some of your smokeless
24 tobacco products; is that correct?

25 A. I believe that the Swedish government

1 requires a warning label, and we have placed them on
2 snuff that has been sent to Sweden.

3 Q. Noting Mr. Jennings' objection, Mr. Bantle,
4 isn't it true that you did not mention that fact in
5 your response to this interrogatory?

6 A. I was not aware of the response.

7 Q. Somebody in the corporation signed it under
8 oath, but you weren't aware of it?

9 A. That that statement was there, I was not
10 aware of it, sir.

11 Q. But it is, and noting Mr. Jennings'
12 objection, it is true that your company has, in fact,
13 placed warnings on products sold outside of the
14 United States?

15 A. Yes, sir. I believe so.

16 Q. Can you tell us what that warning said?

17 MR. JENNINGS: Show our objection.

18 MR. BRALY: Noting his objection -- I will
19 note your continuing objection to this line of
20 questions, Mr. Jennings.

21 Q. (BY MR. BRALY) Mr. Bantle, can you tell the
22 jury here in Oklahoma what the warning said in
23 Sweden?

24 A. It is in Swedish, and I couldn't really tell
25 you the exact words, sir.

1 Q. Let me hand you what has been marked as
2 Plaintiff's Deposition Exhibit 24. And you have
3 never seen that document before, I don't think. But,
4 Mr. Bantle, isn't that a translation done by the
5 Swedish Embassy in Washington, D. C., an original?

6 A. Yes, sir. I would think so, sir.

7 MR. JENNINGS: We object to this document,
8 of course.

9 Q. (BY MR. BRALY) Mr. Bantle, before we go any
10 further, I want to ask you to identify some of your
11 company's products for me. First off, I want to hand
12 you what has previously been marked as Plaintiff's
13 Exhibits 16 and 18 to Doctor Hoffmann's deposition.
14 I brought them along today. Can you hold those up so
15 the camera can see those?

16 A. (Witness complies).

17 Q. And tell the jury, are those the products of
18 the United States Tobacco Company?

19 A. Yes, sir. They are products of U.S.
20 Tobacco.

21 Q. All right. Now, let me hand you what has
22 been marked as Exhibit 23-A to your deposition. Can
23 you identify that exhibit?

24 A. Yes. That is a product of U.S. Tobacco.

25 Q. Does it have a warning on it?

1 A. No, sir.

2 Q. Let me hand you what has been marked as
3 Deposition Exhibit 23-B. Is that a product of the
4 U.S. Tobacco Company?

5 A. Yes, sir.

6 Q. Does it have a warning on it?

7 A. No, sir.

8 Q. Let me hand you what has been marked as
9 Exhibit 23-C. Is that a product of the U.S. Tobacco
10 Company?

11 A. Yes, sir.

12 Q. Let me hand you what has been marked as
13 Exhibit 23-D. Is that a product of the United States
14 Tobacco Company?

15 A. Yes, sir.

16 Q. Let me hand you what has been marked as
17 Exhibit 23-E.

18 A. Yes, sir.

19 Q. Is that a product of the U.S. Tobacco
20 Company?

21 A. Yes, sir.

22 Q. You sell all of those products in the United
23 States, don't you?

24 A. Yes, sir.

25 Q. You also sell a product called Skoal Bandits

1 in the United States, don't you?

2 A. Yes. This is Skoal Bandits.

3 Q. That's the mint version?

4 A. Yes, sir.

5 Q. You sell another version in a green can
6 though, don't you?

7 A. Yes, sir.

8 Q. None of the products you have just
9 identified carry any warning labels, do they?

10 A. No, sir, they don't.

11 Q. Let me ask you to identify what has been
12 marked as Exhibit 23-F. Is that one of the products
13 made by the United States Tobacco Company?

14 A. Yes, sir.

15 Q. That product is different, isn't it?

16 A. Yes, sir.

17 Q. In what respect is it different?

18 MR. JENNINGS: We object, of course, to
19 Exhibit 23-F.

20 A. It carries the Swedish warning labels, sir.

21 Q. (BY MR. BRALY) And where was that product
22 made?

23 A. I can't honestly say, sir, whether that was
24 made in --

25 Q. Let me ask you a simpler question. Where

1 does the label say it was made?

2 A. Made in the U.S.A., Greenwich, Connecticut.

3 Q. Greenwich, Connecticut, is your corporate
4 headquarters, isn't it?

5 A. Yes, sir.

6 Q. Now, would you take that product, sir, and
7 hold it up so the cameraman can read the label. You
8 will need to hold it real steady and right side up.
9 It will take him a minute to focus it.

10 Q. (BY MR. BRALY) That is just a little paper
11 label that was slapped on the bottom of the can,
12 isn't it?

13 A. Yes, sir.

14 Q. Now, Mr. Bantle, I anticipated that you
15 would not be able to read Swedish. Do you have any
16 idea, other than by that translation, what that
17 warning label says in Swedish?

18 A. From the translation I have.

19 Q. Prior to reading that translation that I
20 brought here today to this deposition, do you have
21 any idea what it said?

22 MR. JENNINGS: We are showing our continuing
23 objection to this line of questioning.

24 MR. BRALY: Yes, sir.

25 MR. JENNINGS: All right.

1 Q. (MR. BRALY) Mr. Bantle, let me show you a
2 large blowup. I had this made because I anticipated
3 that you might not be able to read Swedish. It has
4 been marked for identification as Exhibit 24-A. Do
5 you recognize the photographs at the top as being
6 photographs of that same can of Skoal Bandits --

7 A. Yes, sir.

8 Q. -- that you just identified as 23-F?

9 A. Yes, sir.

10 Q. Would you, for the benefit of the jury here
11 in Oklahoma, read the warning label as translated by
12 the Swedish Embassy.

13 A. "Warning. Snuff and chewing tobacco
14 contains nicotine causing a strong dependency equal
15 to that of tobacco smoking. Mucous membranes and
16 gums may be damaged and require medical attention.
17 National Board of Health & Welfare."

18 Q. Mr. Bantle, you don't deny that in virtually
19 of decade of this century there's been one or more
20 articles that have appeared in the recognized
21 scientific literature that have reported on this
22 problem with snuff in oral cancer?

23 A. No, sir, I would not deny that.

24 Q. As a matter of fact, some of those articles
25 have had titles that were like -- with a title

1 something like "Snuff Dipper's Cancer;" haven't they?

2 A. I am not particularly familiar with that
3 one.

4 Q. It wouldn't surprise you though, would it?

5 A. No, sir.

6 Q. It wouldn't surprise you that in 1963 two
7 doctors by the name of Rosenfield and Calloway
8 published an article in the American Journal of
9 Surgery whose title was, in fact, "Snuff Dipper's
10 Cancer"?

11 A. I'm not familiar with that article, sir.

12 Q. In any event, after that article was
13 published in 1963, you didn't bother to inform the
14 consumer of your snuff products that there was at
15 least a couple doctors out there that thought there
16 was a disease and they have named that disease Snuff
17 Dipper's Cancer, did you?

18 A. No, sir. We had constantly looked at the
19 literature, and still constantly looked at the
20 literature and all science that's out there and
21 available to us, and we have made a decision, based
22 on that that a warning label was not necessary.

23 Q. Is that the only consideration that you made
24 or that you took, is that the only factor that you
25 took into consideration in making that decision was

1 your evaluation of the medical literature?

2 A. Oh, no, sir.

3 Q. Well, what other considerations?

4 A. The medical literature, the research that
5 had been -- had been done, not just -- just that one
6 piece of literature, but all of the literature, all
7 the information that is available to our research
8 department, to the scientists who we worked with over
9 the years and the -- all this information is
10 constantly looked at.

11 Q. But did I understand you what you are
12 telling me is that the medical, the scientific and
13 the research information is the only
14 consideration -- those are the only factors that went
15 into the consideration as to whether to put a warning
16 label or not on your snuff?

17 A. No, I think besides the -- We would also
18 look at the political considerations and certainly
19 our legal people were asked for their input into the
20 situation.

21 Q. Well, what were those considerations?

22 A. Which, sir?

23 Q. Mr. Bantle, let me back off and ask this
24 question differently. Would you tell the jury each
25 factor that your company considered in trying to

1 decide whether or not to put a warning label on its
2 snuff products.

3 A. All the medical research that was
4 available. All that had been done by the Smokeless
5 Tobacco Council, by the Smokeless Tobacco Research
6 Council, by the independent contractors that we had
7 worked with in the past. All the literature that's
8 in the books, the information that we had been
9 furnished and reviewed at conferences that our people
10 attended, all that information, along with -- with
11 the political ramifications of Congress in their
12 placing labels on other products and where would we
13 stand, and our legal department looking at the
14 considerations that had been -- the people that we
15 had testifying at all of the State investigations or
16 hearings. All these things went into consideration
17 as they came in to play over the years.

18 Q. Was there anything else?

19 A. I can't think of anything right now.

20 Q. Well, if you want to take some more time and
21 think about it, I want a full and complete answer to
22 that question as best as you are capable of giving
23 this jury.

24 A. Well, we looked at all the -- all the
25 research that's been done, all the worldwide, all the

1 papers that have been published, all the research
2 that our people could find on the subject.

3 I think we have done a very, very, thorough
4 review of the research. We have consulted with
5 people to see if we are making the proper decision at
6 all times, and we came to the conclusion that a
7 warning label was not necessary.

8 Q. If you had put a warning label on the
9 product, you could have told the consumers that there
10 is some medical literature out there that at least
11 leads some competent scientist to think that this
12 stuff causes cancer. You could have done it,
13 couldn't you?

14 A. If we put a warning label on it?

15 Q. That would have been a true statement,
16 wouldn't it? "Consumer, there are some scientists
17 out there that thinks that this stuff causes cancer."
18 That would have been a true statement?

19 A. Yes, that would have been a true statement.

20 Q. You could have put that as a warning label
21 on your snuff products?

22 A. Yes, sir.

23 Q. But your company chose not to do that?

24 A. We made a judgment not to sir, yes, sir.

25 Q. Mr. Bantle, I don't want to be repetitive,

1 but was there was one thing that you did not mention
2 among that long list of considerations. Do you know
3 what that is?

4 A. No, sir.

5 Q. You don't have any idea?

6 A. No, sir.

7 Q. Did your company ever stop to think that it
8 might hurt your sales and growth of your company if
9 you put a warning because people might quit dipping
10 snuff?

11 A. No, sir.

12 Q. That never entered your mind?

13 A. No, sir.

14 Q. Not at all?

15 A. No, sir.

16 Q. And you are telling the jury that under oath
17 that that never entered your mind?

18 A. We never considered that as part of the --
19 if we went right back to the frank statement that you
20 showed here, no consideration.

21 Q. The answer to my question is that you are
22 telling the jury under oath the fact that people
23 might quit buying your snuff and your profits might
24 go down, never entered into the consideration of
25 whether to put a warning on or not?

1 A. Well, it never entered into my mind. It
2 could have entered into considerations. It could
3 have been mentioned or spoken of, but I never looked
4 at it as that being a problem.

5 Q. But, that --

6 A. It was something that we should consider.
7 If we are considering a warning label, we are doing
8 it because of people's health.

9 Q. But you didn't decide that it was -- it
10 would be of interest to people to be alerted that
11 there were at least some scientists out there that
12 were saying that snuff caused cancer?

13 A. We looked at all of the literature and
14 determined that it was not necessary for us to put a
15 warning label on it.

16 MR. JENNINGS: I believe we have been going
17 a little over an hour, we need a recess.

18 MR. BRALY: Fine, we will take a five-minute
19 recess.

20 Q. (BY MR. BRALY) Mr. Bantle, we have had a
21 short break and we are back on the record.

22 MR. BRALY: Your Honor, there is a document
23 that comes up almost immediately. I am going to move
24 its admission.

25 (Handed to counsel).

1 MR. JENNINGS: May we approach the bench,
2 Your Honor?

3 (The following proceedings were had AT THE SIDE
4 BAR.)

5 MR. JENNINGS: If the Court please, we
6 object to this document because of the references in
7 it to political activity involving --

8 THE COURT: I think I have ruled on that,
9 have I not?

10 MR. BRALY: Yes.

11 MR. JENNINGS: Not with regard to a specific
12 document.

13 THE COURT: As I stated yesterday, I am
14 satisfied that solicitation of Congressmen is not an
15 admission into evidence of a solicitation of
16 political persons in regard to product, does not
17 constitute a violation of the right of a petition of
18 Congress. It is not a limitation of the right of
19 freedom of petitioning.

20 I will cite the Pennington case, which I
21 mentioned earlier, so your objection will be
22 overruled..

23 MR. BRALY: May we publish this; it is Trial
24 Exhibit 180.

25 THE COURT: Yes.

1 MR. BRALY: Publish it at an appropriate
2 time.

3 (The following proceedings were had IN OPEN COURT.)

4 Q. Mr. Bantle, do you recall in 1983 in
5 January, there was a news story run on television
6 about snuff and the possible relationship to oral
7 cancer?

8 A. Yes, sir.

9 Q. Any response to that television story, you
10 wrote a letter, I think, on January 12th. Let me
11 hand you what has been marked for identification as
12 Deposition Exhibit 25. It's a document for
13 identification that's on U.S. Tobacco Intracompany
14 Correspondence and on the top it indicates in print
15 that it is from Louis F. Bantle, chairman of the
16 board and president, to Barry Nova, executive
17 vice-president and president, can you identify that
18 document.

19 A. (Witness reviews document) Yes, sir.

20 Q. Mr. Bantle, is that a letter that you sent
21 with respect to the Monday broadcast on television to
22 the president of the Tobacco Division of the United
23 States Tobacco Company?

24 A. Yes, sir.

25 Q. What were the downsides of the TV broadcast

1 that U.S. Tobacco Company was concerned about?

2 A. I don't remember the exact content of
3 the -- of the broadcast. I believe it was Matt
4 Meyers, but I don't remember the details of the
5 program, except that it was making charges against
6 our product that apparently I was quite upset about
7 it.

8 Q. Didn't you state in here that you should
9 develop a strategy to keep the Surgeon General from
10 putting a warning label on snuff?

11 A. I think we said we should approach the
12 Surgeon General.

13 Q. Mr. Bantle, didn't you say in fact, and I
14 quote, "What is this downside on Monday's broadcast?"
15 New sentence, quote -- This is your quotation marks.
16 "The Surgeon General warning snuff dipping may cause
17 cancer," .

18 The next sentence, "It's possible it could
19 trigger such a suggestion."

20 And you were concerned that that program
21 might trigger some curiosity and interest about your
22 snuff products so that the Surgeon General might be
23 motivated to cause a warning to be placed on snuff,
24 weren't you?

25 A. I don't remember exactly what I was worried

1 about. I know there was a broadcast that had me
2 worried and upset. These were questions that I was
3 posing for looking into.

4 Q. Didn't you rather than ask a question make a
5 statement and wasn't your statement, "We should
6 develop a strategy for such possibility, or better
7 for seeing that it does not happen."

8 Isn't that what you said, Mr. Bantle?

9 A. Yes, sir.

10 Q. What you were trying to keep from happening
11 was a warning by the Surgeon General on snuff.
12 Right?

13 A. Yes, sir.

14 Q. And among the things you were going to do
15 was to contact all members of Congress; isn't that
16 right?

17 A. I said, "things to be considered."

18 MR. BRALY: Your Honor, we are anticipating
19 what you would rule, we have reached an agreement,
20 believe it or not.

21 THE COURT: Okay.

22 Q. Down at the last paragraph didn't you say
23 that you have Washington contacts and if we don't get
24 there first, the American Cancer Society will?

25 A. Yes, sir. We had to present our case, which

1 I think is only proper.

2 Q. And the last paragraph it says "Please
3 discuss with Jim Chapin and schedule SMC for
4 discussion early next week." You said that, didn't
5 you?

6 A. Yes, sir.

7 Q. What is the SMC?

8 A. That's the management committee.

9 Q. What does the "S" stand for?

10 A. Strategic Management Committee, are the
11 words that we were using.

12 Q. And who is Mr. Jim Chapin?

13 A. Mr. Jim Chapin is our legal counsel.

14 Q. So you were referring this matter to your
15 strategic management committee for action for the
16 next week; is that correct?

17 A. For discussion.

18 Q. For a discussion?

19 A. Yes, sir.

20 Q. Tell us a little more about your strategic
21 management committee. What is that?

22 A. It's the -- an in-house group of the top
23 management of the company who discuss where are we
24 going, what our directions were, our road paths, a
25 rather informal, it doesn't meet at all times or on

1 any regularly scheduled basis.

2 Q. Consists of high level people in the
3 corporation?

4 A. Yes, sir.

5 Q. And they formulate strategic plans for the
6 management of the company?

7 A. We don't have a formal written strategic
8 long-range plan, no, sir.

9 Q. At any rate, whatever this committee does
10 you call it the Strategic Management Committee?

11 A. Yes, sir.

12 Q. Who are some of the members of that
13 Strategic Management Committee?

14 A. It has changed over a period of time, but it
15 is usually the top members of the company. The -- at
16 the time, Mr. Noble was president of the Tobacco
17 Division. He was a member. Mr. O'Grady, the top
18 financial man, Mr. Rossi the top human relations man,
19 Mr. Maroconi would be as president now.

20 We really haven't used the strategic
21 management committee as much in the last two years as
22 we had talked about it before. But it would be the
23 top-level people who were involved in looking, where
24 is the company going, acquisitions, that sort of
25 thing.

1 Q. Other than yourself, they were the highest
2 ranking people in the corporation, weren't they?

3 A. Yes, sir.

4 Q. Now, what did your legal counsel have to do
5 with this? This was a health issue, not a legal
6 issue, wasn't it?

7 A. Well, we weren't sure whether everything
8 that had been said on that program should have been
9 said, or whether we had room for legal action.

10 Q. Mr. Bantle, that meeting or that letter that
11 you sent was sent on January the 12th, 1983; isn't
12 that correct?

13 A. Yes, sir.

14 Q. And a week later on January the 18th, 1983,
15 there was a meeting of the regulatory political
16 environment meeting. What is the regulatory
17 political environment meeting?

18 A. The regulatory political environment
19 meeting.

20 Q. Mr. Bantle, I won't try and keep you in the
21 dark, sir. I have got a document that I have
22 retrieved from your files. It has U.S.T.'s initials
23 on it and a number of 000087. I have marked it for
24 identification as Deposition Exhibit 26, it has got
25 the date January 18th on it. Before I give it to

1 you, January 12th the letter we were just referring
2 to, --

3 A. Yes, sir.

4 Q. It is a document that has been so-labeled
5 for identification. See if you can tell the jury
6 what that document is?

7 MR. BRALY: Trial Exhibit 197, Your Honor,
8 it was Bantle's Deposition Exhibit 26.

9 THE COURT: Any additional objection to
10 this?

11 MR. JENNINGS: No objection, Your Honor.

12 THE COURT: Plaintiff's -- what's the
13 number?

14 MR. BRALY: Trial Exhibit 197.

15 THE COURT: Plaintiff's 197 will be
16 admitted.

17 A. (Witness reviews document.) I can't explain
18 what that document is. I don't know what that
19 document is. It looks like the --

20 Q. It certainly deals with the subject; doesn't
21 it?

22 A. Yes, sir, but that --

23 Q. It was created a week after your letter,
24 right?

25 A. (Witness nods, yes.)

1 Q. Let me hand you what -- And it has got
2 U.S.T.'s identification down at the bottom --

3 Let me hand you another document that has
4 been marked for identification as Deposition Exhibit
5 27. Can you tell the jury what that document is.

6 MR. JENNINGS: May we approach the bench?

7 THE COURT: Yes, sir.

8 (The following proceedings were had AT THE SIDE BAR.)

9 MR. JENNINGS: If the Court please, we want
10 to show our objection to this document in order to
11 preserve our objection on political activity.

12 THE COURT: All right. It will be the same
13 basis --

14 MR. JENNINGS: Yes.

15 THE COURT: -- as the prior objection.

16 MR. JENNINGS: Yes.

17 THE COURT: I have employed this, unless
18 there is something other than what you have brought
19 up before. I think it would be relevant on the
20 issues, and I am overrule your objection.
21 Plaintiff's 182 will be admitted.

22 MR. BRALY: Thank you

23 (The following proceedings were had IN OPEN
24 COURT.)

25 A. This appears to be a preliminary strategy .

1 recommendations from the task force on Regulatory and
2 Political Environment, and it's quite extensive. I
3 briefly looked through it.

4 Q. That was one of your task forces and they
5 ultimately did make this report to your office,
6 didn't they?

7 A. I don't see a date on this. That would
8 refresh my memory more if it did.

9 Q. I don't see a date on it either, but this is
10 the way it came from your company's files?

11 A. Yes, sir.

12 Q. You did have such a task force, didn't you?

13 A. Yes, we did have. The exact time of it, I
14 am not sure.

15 Q. But it clearly was dealing with this issue
16 of the problem with the warning label on your snuff
17 product, wasn't it?

18 A. I think it was dealing with a lot more than
19 warning labels.

20 Q. Dealing with the whole health problem
21 associated with the use of your snuff product, wasn't
22 it?

23 A. Yes, sir.

24 Q. And the plans the company was going to
25 implement to try and deal with that problem, right?

1 A. Well, there were preliminary recommendations
2 in this. As I scanned through it, it looks like it
3 was more of a putting everything on the table that
4 could possibly be considered.

5 Q. Now, Mr. Bantle, before we move on, I want
6 to ask you one question about this warning that you
7 put on your snuff products in Sweden.

8 MR. JENNINGS: Show our objection.

9 MR. BRALY: Yes, sir. I note your
10 continuing objection.

11 Q. (BY MR. BRALY) Mr. Bantle, can you tell the
12 jury sitting here in Oklahoma City why that a mother
13 and father of a child in Sweden should get more of a
14 warning than a mother and father of a child here in
15 Oklahoma?

16 A. I believe the Swedish government has made a
17 determination that that warning label must be on the
18 products in Sweden.

19 Q. See if I understand you correctly. What you
20 are saying is that your company not only disagrees
21 with all of the scientific literature on the subject,
22 but your company, the U.S. Tobacco Company disagrees
23 with the findings of the Swedish government on this
24 issue, too; is that correct?

25 MR. JENNINGS: Object to the form of the

1 question because of the assumption that they disagree
2 with all of the scientific findings.

3 Q. (BY MR. BRALY) Mr. Bantle, for whatever
4 reason, you don't think the medical evidence is
5 sufficient to warrant putting a warning on your snuff
6 products, do you?

7 A. That's true, sir.

8 Q. And for whatever reason, your company thinks
9 the Swedish government is wrong and your company is
10 right, don't you?

11 A. Well, it is the law in Sweden, so we will
12 obey the law, as we are here.

13 Q. I understand you will obey the law, but they
14 have made a judgment that there ought to be a warning
15 on this stuff to convey some health hazards. And you
16 disagree with that judgment made by the Swedish
17 government, don't you?

18 A. Yes, sir.

19 Q. So you think that you are right and they are
20 wrong on that issue?

21 A. Yes, sir, but we obey the law.

22 Q. Yes, sir. But now, there is a number of
23 other medical groups, organizations and authorities
24 that also have found that snuff causes cancer, aren't
25 there?

1 A. I'm not aware that they have stated that it
2 causes cancer.

3 Q. Mr. Bantle, can you identify any
4 organizations, advisory boards, agencies of the
5 United States Government or agencies of the World
6 Health Organization that have made the statement to
7 the effect that there is a causal relationship
8 between the use of snuff and oral tobacco?

9 A. A causal relationship, that's different from
10 what you asked before, that it causes cancer. I'm
11 not aware of anyone has said that snuff causes
12 cancer.

13 Q. Mr. Bantle, let me ask you this, then. Are
14 you aware that on February the 6th, 1985, that the
15 National Cancer Advisory Board of the United States
16 Government in a resolution on smokeless tobacco made
17 the following statement: "There is sufficient
18 evidence for a cause and effect relationship between
19 smokeless tobacco use and human cancer. Are you
20 aware of that?

21 A. No, sir.

22 Q. But you disagree with it?

23 A. I'm not a scientist, but --

24 Q. Do you disagree with it?

25 A. I don't believe that it has been established

1 that our product causes cancer.

2 Q. Mr. Bantle, my question was do you disagree
3 with the findings of the National Cancer Advisory
4 Board of the United States government?

5 A. I'm not in a position myself to disagree
6 with it or not.

7 Q. Does your company disagree with them?

8 A. I believe after reviewing all the
9 information that we would disagree with them, yes.

10 Q. So they are wrong and your company is right?

11 A. Yes, sir.

12 Q. The Swedish government is wrong and your
13 company is right?

14 A. We believe that we have made that
15 determination, sir.

16 Q. Mr. Bantle, have you ever heard of an
17 organization called the International Agency for
18 Research on Cancer?

19 A. No, sir, I haven't.

20 Q. You have never heard of that organization?

21 A. No, sir.

22 Q. Nobody in your organization has ever talked
23 to you about the existence of this organization?

24 A. Not that I can recall, sir.

25 Q. Mr. Bantle, I am going to hand you what has

1 been marked for identification as Plaintiff's Exhibit
2 15 in the deposition on Dietrich Hoffmann and Steve
3 Hecht. I am going to ask you to look at Page 116 and
4 read the first sentence on that page to the jury.

5 A. "There is significant evidence that oral use
6 of snuffs of the type commonly used in North America
7 and Western Europe is carcinogenic to humans."

8 Q. Mr. Bantle, let me ask you to go back and
9 look at the first few words again and reread them.
10 Didn't you misstate that, doesn't it say there is
11 sufficient evidence, rather than significant
12 evidence?

13 A. Sufficient, I'm sorry, yes. "There is
14 sufficient evidence --

15 Q. -- that oral use of snuffs that are commonly
16 found in North American and Western Europe are
17 carcinogenic to humans?"

18 MR. JENNINGS: Show our objection to this
19 exhibit as being hearsay.

20 Q. (BY MR. BRALY) Before you take it back, Mr.
21 Bantle, would you hold it up so the camera man can
22 get a picture of the cover and identify the document.

23 A. (Witness complies).

24 Q. You need to pull it back just a bit so he
25 can focus on it.

1 A. (Witness complies).

2 Q. Mr. Bantle, would you turn the book around
3 and just read the title to the jury so they will know
4 what you were reading from.

5 A. "IARC monograms on the evaluation of the
6 carcinogenic risks of chemicals to humans." Tobacco
7 habits other than smoking betel quid, Areca-Nut
8 chewing and some relative -- and some related
9 nitrosamines, Volume 37, IARC, LYON, FRANCE,
10 September, 1985."

11 Q. Mr. Bantle, are you telling the jury in this
12 case, were you not aware that there was even an
13 organization by the name of International Agency for
14 Research on Cancer?

15 A. I have not heard of that agency.

16 Q. But, in any event, I take it that the U.S.
17 Tobacco Company disagrees with the finding of this
18 division of the World Health Organization.

19 A. Yes, sir.

20 Q. Mr. Bantle, let me hand you what has been
21 marked as the Deposition Exhibit 11 from the
22 deposition of Mr. -- of Doctor Jack Henningfield,
23 taken last week, which I will further identify for
24 the purposes of this deposition as being a document
25 styled "Report to the Surgeon General's Advisory

1 Committee on the health consequences of using
2 smokeless, dated March 24th, 1986."

3 Have you heard of this document, sir?

4 A. Yes, sir.

5 Q. All right. There is a finding in this
6 document about snuff and cancer, isn't there?

7 A. I'm not certain, sir. I haven't seen the
8 document.

9 Q. Let me hand you the document. I call your
10 attention to the preface and ask you to read the
11 first sentence under Paragraph 2.

12 MR. JENNINGS: We would object, of course,
13 to the document as being hearsay, also because it is
14 obviously, a 1986 publication, which is totally
15 irrelevant and immaterial in this litigation, and we
16 object to the previous document on the basis of its
17 time of publication, also.

18 Q. (BY MR. BRALY) Would you read that sentence
19 out loud to the jury in this trial, sir.

20 A. "The scientific evidence is strong that the
21 use of snuff can cause cancer in humans."

22 Q. Mr. Bantle, I want to make sure that I and
23 the jury understand clearly what it is that your
24 corporation is saying with respect to the health
25 hazards of snuff.

1 Do I understand the position of your company
2 to be that on the issue of the health hazards of
3 snuff that the Swedish Government is wrong and has
4 been wrong since the 1970's?

5 MR. JENNINGS: I object to the question as
6 being repetitious. It has been asked and answered,
7 and I instruct the witness he need not answer the
8 same question again.

9 Q. (BY MR. BRALY) Are you refusing to answer
10 that question?

11 MR. JENNINGS: Yes, he's refusing upon my
12 instruction to answer the question again. He is not
13 refusing to answer the question. He has answered the
14 question. He's refusing to answer it again.

15 MR. BRALY: I am just trying to make sure
16 that we pull all this together.

17 MR. JENNINGS: Well, we --

18 Q. (BY MR. BRALY) Now, Mr. Bantle, I take it
19 that on your counsel's instruction you are refusing
20 to answer my last question; is that correct?

21 A. That's correct.

22 Q. All right. Now, I take it that if I ask you
23 if you agreed or disagreed with the findings of the
24 National Cancer Advisory Board, that you would refuse
25 to answer that question again, too?

1 MR. JENNINGS: He has already answered the
2 question. It has been asked and answered. It is
3 repetitious. This deposition is going to end very
4 shortly and I would like to get it over with.

5 Q. (BY MR. BRALY) Mr. Bantle, with respect to
6 the findings of the International Agency for Research
7 on Cancer, is it the position of your corporation
8 that their finding that snuff causes human cancer is
9 wrong, that your company is right?

10 MR. JENNINGS: Object to the form of the
11 question, because of the paraphrasing of the finding.
12 I'm not sure whether that's what it says and also I
13 believe that one has already been answered, but I'm
14 not positive.

15 MR. BRALY: I will read it again.

16 Q. (BY MR. BRALY) Are you telling this jury
17 that the finding by the International Agency for
18 Research on Cancer, and I quote, sir, from page 116
19 of the document.

20 "There is sufficient evidence that oral use
21 of snuffs of the types commonly used in North America
22 and Western Europe is carcinogenic to humans."

23 Does your company disagree with that finding
24 by the International Agency for Research on Cancer?

25 A. We do, sir.

1 Q. And, sir, does your corporation disagree
2 with the findings of the Surgeon General of the
3 United States that you just read to the jury?

4 A. Yes, sir.

5 Q. Do you disagree with the findings of all
6 four of those people we just talked about?

7 A. Yes, sir.

8 Q. And you don't think that even their findings
9 should be communicated in the form of a warning to
10 your customers of your snuff products?

11 A. Would you repeat that question.

12 Q. You don't think that even their findings
13 from those governmental agencies should be
14 communicated to the users of your snuff products in
15 the form of a warning?

16 A. There will be a warning on our label.

17 Q. Yes, there will be, but that is not only
18 because Congress has told you to. You haven't done
19 it voluntarily, has your company?

20 A. No, sir, we have not done it voluntarily.

21 Q. Mr. Bantle, -- just one moment, sir. I am
22 putting up on the board what is marked I believe as
23 Exhibit 27-A. It is a page from a document that has
24 previously been identified as Exhibit 27, being this
25 strategy recommendations from the task force on

1 regulatory and political environment.

2 Mr. Bantle, I believe that's Page 178 of the
3 document, if you would like to refer to it. Have
4 you found it, sir?

5 A. No, sir. Page 178? Oh, I'm sorry. Yes,
6 sir.

7 Q. Mr. Bantle, isn't it in fact true that the
8 people that prepared this document all of which I
9 believe you have testified were high-level people
10 second only to your office, have written down black
11 on white --

12 A. No, sir.

13 Q. No, sir? This is your task force on the
14 regulatory political environment; is that right?

15 A. Yes, sir, but you are confusing that with
16 the SCM.

17 Q. All right. I stand corrected.
18 Nevertheless, this is your task force on the
19 Regulatory and Political Environment; is that
20 correct?

21 A. I believe so.

22 Q. All right. And that task force put down the
23 statement that is outlined in pink on that page; is
24 that correct?

25 A. Yes, it is.

1 Q. Would you read that statement to the jury.

2 A. "NNN Major Health Problem."

3 Q. Isn't that a statement by your employees
4 that norniconitrosamine is a major health problem?

5 A. I don't know that the person who wrote that
6 would really know whether it was or not. I don't
7 know who wrote this.

8 Q. Mr. Bantle, you are the chief executive
9 officer of this corporation, aren't you?

10 A. Yes, sir.

11 Q. And you are responsible for the management
12 and operation of the corporation?

13 A. Yes, sir.

14 Q. And, Mr. Bantle, I have got one simple
15 question. Isn't it true that somebody on the task
16 force on Regulatory Political Environment has written
17 down in your corporate documents that belong to the
18 U.S. Tobacco Company that NNN is a major health
19 problem?

20 A. Somebody wrote that, sir.

21 Q. Yes, sir. Mr. Bantle, calling your
22 attention back to this Regulatory Political
23 Environment meeting that was held on January 18th. I
24 want to show you an enlargement from the second page
25 of that document. I want to ask you a question, Mr.

1 Bantle.

2 Isn't it true that the reason you didn't put
3 warnings on your snuff products was because it was
4 legally better if you were forced rather than
5 voluntarily putting one on?

6 A. Would you repeat that question?

7 Q. Mr. Bantle, isn't it true that the reason
8 you didn't put the warnings on the snuff products was
9 because you thought it was better for your legal
10 position if you waited until Congress forced you to
11 put a label on it?

12 A. No, sir.

13 Q. Would you turn around and read those three
14 lines to the jury.

15 MR. JENNINGS: We object to that chart for
16 the further reason that it's been highlighted, and
17 the chart is not an accurate copy of the exhibit.

18 Q. (BY MR. BRALY) Mr. Bantle, if you object to
19 reading from that chart, I will be glad to let you
20 read from the original document if you will just read
21 from the same three lines. The text is the same in
22 both instances, isn't it, sir?

23 A. Yes, sir.

24 Q. Would you read those three lines for the
25 benefit of the jury in this case.

1 A. "There is a benefit from the product
2 warning -- product liability point of view on the
3 warning notice. We may have to put a warning on
4 ourselves. Legally, it is better if we are forced
5 rather than voluntarily putting one on."

6 Q. Why is it better for your legal position if
7 you are forced to put a warning on rather than doing
8 it voluntarily?

9 A. I don't know that that's true, sir.

10 Q. Do you disown this statement?

11 A. I didn't make that statement.

12 Q. Your company's employees did, didn't they?

13 A. Someone did. I don't know who wrote this.

14 Q. So you're just saying that that was
15 somebody's pipe dream?

16 A. I didn't say it was a pipe dream. They may
17 have believed it.

18 Q. They were setting out, weren't they, their
19 findings on the regulatory political environment with
20 respect to the United States Tobacco Company, weren't
21 they?

22 A. They were reviewing a lot of things in here.

23 Q. And one of the things you reviewed was the
24 choices with respect to whether to put warning labels
25 on your product or not?

1 A. I didn't review this. I didn't do this. I
2 am not sure who did it, and I think that they made a
3 statement. I don't know if the statement was
4 correct, but they made the statement.

5 MR. BRALY: No further questions. We move
6 the admission of all of the exhibits that have been
7 identified. We will note Mr. Jennings' objections as
8 he has made them.

9 THE COURT: Call your next witness.

10 MR. BRALY: Just one moment, Your Honor.
11 Your Honor, we would recall Doctor Jim
12 Horrell.

13 JAMES F. HORRELL,
14 recalled as a witness on behalf of the plaintiff,
15 having been previously sworn, testified further as
16 follows:

17 THE COURT: You may resume the stand, you
18 are under the same oath, I believe, on Friday.

19 THE WITNESS: Yes, sir.

20 DIRECT EXAMINATION (cont'd.)

21 BY MR. BRALY:

22 Q. Doctor Horrell, welcome back. Last week,
23 just to back up a few steps, you mentioned that you
24 were teaching classes at the University of Oklahoma.
25 Tell us again what courses that you teach there.

1 A. Yes, I teach graduate level statistics and
2 quantum methods courses. I have been teaching for
3 the past five years courses in finance and corporate
4 finance, capital budgeting, financial institutions
5 and marketing, investments and a graduate course in
6 investments.

7 Q. What do you do in those courses that you
8 teach on financial marketing and investments and that
9 sort of courses?

10 A. Well, the courses that I have described
11 actually sort of give a general overview of the
12 finance curriculum, and the finance curriculum is
13 devoted to a study of the strategies and the
14 structure of the financing of corporations in
15 general, and the evaluation thereof.

16 Q. Do you consider the particular financial
17 conditions, study particular different financial
18 statements?

19 A. Yes.

20 Q. And groups of statements on different-
21 companies?

22 A. As a matter of fact, the primary focus of
23 those courses is structured around what are known as
24 the financials of the company, and that consists of
25 the balance sheet, the summary of operations, the

1 uses and sources of funds.

2 Q. Doctor Horrell, in connection with your
3 testimony here today, have you looked at some of the
4 financial statements for the United States Tobacco
5 Company?

6 A. Yes, I have.

7 Q. Would you describe briefly what it is that
8 you have looked at.

9 A. Well, I have looked at their financials
10 through, say, summaries that appear in their annual
11 reports and also summaries that appear in Moody's,
12 Standard & Poor's, and Value Line, all of which are
13 common reporting sources on public information about
14 large corporations.

15 Q. Is that the kind of information that experts
16 in your field would customarily rely upon in judging
17 corporations?

18 A. Yes, it is. As a matter of fact, it is the
19 very sources that we go to.

20 MR. BRALY: Your Honor, as part of the
21 Chairman of the Board Bantle's deposition, he
22 identified two exhibits that I will now offer. They
23 were marked as deposition exhibits; they have been
24 remarked as Trial Exhibits 155 and 156. They are the
25 1981 and 1983 annual reports for the U.S. Tobacco .

1 Company. I ask that they be admitted into evidence.

2 THE COURT: Any objection?

3 MR. JENNINGS: If the Court please, we
4 would, for the record, like to object. We realize
5 what the Court's ruling is, but we want to preserve
6 our record on that.

7 THE COURT: Plaintiff's 155 and 156 will be
8 admitted.

9 MR. BRALY: May I approach the witness, Your
10 Honor?

11 THE COURT: (Nodding yes).

12 Q. (BY MR. BRALY) Let me hand you what has
13 been marked as Trial Exhibits 155 and 156. Are those
14 examples of the annual reports of the United States
15 Tobacco Company?

16 A. Yes, they are. One is a xerox copy, and
17 then one is the exact kind of production that they
18 put out and send out to people.

19 Q. Explain to the jury what kind of information
20 is contained in those annual reports.

21 A. Well, there's a report to the shareholders,
22 and then there's usually some information concerning
23 the history of the company and the products that are
24 being offered. And then it gets down to the
25 financials and gives some information about the

1 company inside the industry, the earnings of the
2 company, the financial position, the balance sheet of
3 the company. Also, a statement of changes in
4 shareholder equity, how that changes through time,
5 some general notes on what some specifics in the
6 report mean, and characteristically there are some
7 comparative figures that sometimes run back ten years
8 at a time.

9 Q. All right. Are those comparative figures
10 contained in this report that go back over the
11 preceding decade or so?

12 A. Well, in this particular one, I think
13 five -- well, yes, not -- back to 1972 in this one.

14 Q. And that was in what year?

15 A. This was 1981.

16 Q. Doctor Horrell, before we go any further,
17 how big of a company, how big of a corporation is the
18 United States Tobacco Company?

19 A. Well, it's a big company by most dimensions,
20 and you would have to clarify what dimension that you
21 are interested in for me to --

22 THE COURT: Excuse me. Counsel, come up
23 just a moment.

24 (The following proceedings were had AT THE SIDE
25 BAR.)

1 THE COURT: You know, I am just allowing
2 this into evidence on the issue of punitive damages.
3 Do you want me to advise the jury of that?

4 MR. FINNEGAN: No.

5 MR. JENNINGS: I don't think so.

6 MR. FINNEGAN: No.

7 MR. BRALY: I would ask that they be advised
8 so they can understand the relevance of it, Your
9 Honor.

10 MR. FINNEGAN: No.

11 THE COURT: Go ahead.

12 (The following proceedings were had IN OPEN
13 COURT.)

14 Q. (BY MR. BRALY) Excuse me, Doctor Horrell.
15 Prior to the bench conference, I believe my question
16 was to ask you how big this corporation was, and you
17 said there are a number of ways of looking at it or
18 something to that effect. Is the stock publicly
19 traded on the stock exchange?

20 A. Yes, it is traded on the New York Stock
21 Exchange.

22 Q. Now, are there a number of companies in this
23 country whose stocks are publicly traded?

24 A. Yes. There's probably about 40,000
25 companies that have publicly-traded stock. There are

1 probably somewhere in the neighborhood of 15- to 1700
2 that are traded on the New York Stock Exchange,
3 probably another thousand to 1200 that are traded on
4 the American, and then there's probably another, I'd
5 say, 7500 to 10,000 that are frequently traded on the
6 minor exchanges and what is called the
7 over-the-counter market.

8 Q. All right. I take it this last combination
9 you described amounted to some 10,000 corporations
10 if you added the last three groups together?

11 A. I would say that probably there's more like
12 about, oh, 1250 to 14,000 frequently traded stocks.

13 Q. Would you give me that range again?

14 A. 12- to 14,000 approximately. These are
15 approximate numbers, of course.

16 Q. 12,000 to 14,000 that are frequently traded?

17 A. (Nodding yes).

18 Q. Now, as among all these corporations, where
19 does the United States Tobacco Company stand in terms
20 of the overall size of its assets?

21 A. With respect to its assets I believe that it
22 is ranked 476th out of those companies. It is a
23 member of the Fortune 500.

24 Q. Can you give us some idea of what the
25 long-term earnings history has been for this company?

1 A. Yes. As a matter of fact, --

2 MR. JENNINGS: If the Court please, we would
3 like the record to show our objection.

4 THE COURT: It will be so noted and
5 overruled.

6 A. As a matter of fact, I looked back to 1950
7 and pulled up several earnings series and graphed
8 them; and if you would like, I can paste those up and
9 you can kind of see what's happened over that period
10 of time.

11 Q. (BY MR. BRALY) Does the information that
12 you prepared in the form of a demonstrative exhibit
13 help the jury understand this?

14 A. Well, a picture is worth a thousand words,
15 they say, and these are certainly going to give
16 everyone a feel for what's happened during that
17 period of time to the company.

18 Q. If you will --

19 THE COURT: Counsel, come up just a moment
20 again.

21 (The following proceedings were had AT THE SIDE
22 BAR.)

23 MR. BRALY: Judge, maybe I can help just a
24 minute. I know what your question is.

25 THE COURT: What is the relevancy of going.

1 back so far?

2 MR. BRALY: There is a dual purpose to this
3 portion of his testimony, and the dual purpose is to
4 establish the relationship of the company's earnings'
5 growth with the change in the knowledge of health
6 information about cigarettes.

7 For instance, the company's earnings were
8 absolutely flat through the Surgeon General's report
9 in 1964. At that point they started up. In 1971,
10 according to Mr. Bantle, cigarette advertising went
11 off of TV, and their advertising went on TV, and at
12 that point you can see a fairly dramatic increase in
13 this company's earnings, which are reflections of
14 their sales, which are reflections of the success of
15 their TV marketing. It started off and prevailed
16 through the 1970's, and that's what this exhibit is
17 designed to show.

18 THE COURT: I assume you object to it.

19 MR. JENNINGS: Yes, Your Honor.

20 THE COURT: Any additional objection to what
21 I have --

22 MR. JENNINGS: If the Court please, --

23 THE COURT: What's the relevance of showing
24 the effect of the increased revenues after
25 advertising on television? What is that?

1 MR. BRALY: It shows that their TV
2 advertising was effective in increasing the use of
3 their product. That clearly affected Sean Marsee.
4 It is one thing to say they advertise on TV. It is
5 another thing to show how amazingly effective it was.

6 THE COURT: All right. Go ahead. I don't
7 care about going back to the Fifties.

8 MR. BRALY: He's got it prepared on a chart
9 already. It is a flat line from 1950 through 1964.

10 THE COURT: Go ahead.

11 (The following proceedings were had IN OPEN
12 COURT.)

13 THE WITNESS: Okay. The top graph is yearly
14 revenue from 1950. And this axis is in terms of
15 millions of dollars, so this is 100 million, 200,
16 300, 400 and 500 million. And across 1950's,
17 Sixties, Seventies and then on up into the 1985.
18 This is the earnings before taxes. So when you --

19 The basic formula is that you have revenues,
20 then you subtract out your expenses, operating
21 expenses, all of the things, cost of goods, et
22 cetera, that are classified as expenses, and then you
23 get earnings before taxes, and then ordinarily you
24 subtract out then after that taxes, and so this
25 represents the earnings before taxes, and this

1 represents the earnings after taxes over that same
2 period from 1950 to 1985.

3 Q. Doctor Horrell, let me hand you a Magic
4 Marker. I can't see the years back here and I am
5 satisfied that some of the jurors on this end cannot
6 either. Would you mark the year, put a mark and
7 label above it for the year 1964.

8 A. (Witness complies).

9 Q. All right. Now, while we are at it, would
10 you go ahead and label all of them that way.

11 A. (Witness complies).

12 Q. You need to learn to write better. There
13 you go.

14 Now, would you put a mark in there for 1971.

15 A. (Witness complies).

16 Q. All right. Thank you, sir.

17 Doctor, what presently are the pretax
18 earnings of the United States Tobacco Company?

19 A. In 1985 it was 166 million.

20 Q. Let me ask you to look on there and see if
21 you can locate 1975, find out what it was for that
22 year.

23 A. Rather than read from the graph, in 1975 the
24 pretax or earnings before taxes was 32 million
25 approximately.

1 Q. Doctor, would you put that number down on
2 the white side there up on the white someplace.

3 A. (Witness complies).

4 Q. Why don't you go ahead and write it with all
5 the zeros, if you can, because I am going to ask you
6 to compare it to another number.

7 A. (Witness complies).

8 Q. Now, sir, have you got a calculator with you
9 today?

10 A. Yes, I do.

11 Q. The chairman of the board has just been
12 testifying in a videotape deposition, was not here in
13 person. During the course of his deposition, an
14 interrogatory was read that discloses that in 1975,
15 just a year after the company learned that it had
16 nitrosamines in its products, that it spent certain
17 sums of money for scientific research.

18 Precisely, the question was: "In connection
19 with research of studies relating to safety or lack
20 thereof of the use by the public of your smokeless
21 tobacco products, state how much money, if any, you
22 spent in each of the last ten years with respect to
23 any such research or studies, whether conducted by
24 you or persons acting on your behalf or persons for
25 whom you have provided funds in whole or in part."

1 The answer to that reveals in 1975, United
2 States Tobacco Company spent a total of \$9,613.
3 Would you put that number down, please.

4 A. (Witness complies.) 600 and what?

5 Q. \$13. Would you tell us what fraction of the
6 company's -- well, let's take what fraction of the
7 company's income that represents first, if you have
8 got that number somewhere.

9 A. Well, of the --

10 Q. The \$32,100,000 in profit, what fraction of
11 that profit does that research represent?

12 A. It's 9613 over 32.1 million, would be .0003.

13 Q. Do I understand that to be -- to convert
14 that to a percent, what would that be?

15 A. It would be 3/100 of 1 percent.

16 Q. That is the earnings of the -- excuse me,
17 the profits?

18 A. Well, it is the earnings before taxes.

19 Q. The earnings before taxes. What was the
20 total income of the company that year?

21 A. It was 142,700,000.

22 Q. So it would be some much smaller fraction of
23 their total revenue?

24 A. Yes, I'm afraid this wouldn't do it.

25 Q. And if they spent twice that much the next

1 year or something like that, like \$17,000 the next
2 year, it would still just amount to 6/100 of one
3 percent?

4 A. With respect to that number, yes.

5 Q. Yes.

6 A. If they spent twice that much, then
7 essentially this number would be 0006.

8 Q. Doctor, if the evidence shows that they are
9 spending something in the neighborhood of 800,000 or
10 a million dollars a year in the last couple of years
11 on scientific research, could you compare that again
12 to their recent revenues and their recent earnings?

13 A. Well, it is one-half of one percent. And
14 what I have done there is take the 800,000 that you
15 mentioned and divide by their 1985 earnings before
16 tax.

17 Q. Try the 1984.

18 A. It's about the same, because their earnings
19 before tax for 1985 was 166 million and their
20 earnings before tax for 1984 was 160 million.

21 Q. Doctor, in connection with your research on
22 this matter, have you seen any company documents that
23 would reflect how much money was paid to the chairman
24 of the board for salary?

25 A. Yes, I have.

1 MR. JENNINGS: If the Court please, I
2 object.

3 THE COURT: Sustained.

4 MR. JENNINGS: Thank you.

5 Q. (BY MR. BRALY) In any event, in no instance
6 has the amount of money that they were spending on
7 research risen above the level of even 1 percent of
8 their profits, from what we have just been through?

9 A. Well, it has not risen above one percent of
10 their earnings before taxes.

11 Q. And what was the total revenue of the
12 company, say, in 1984?

13 A. In 1984 it was 382,800,000, approximately --
14 oh, that was '83. I'm sorry. And 1984 was
15 443,800,000.

16 Q. Doctor Horrell, I want to ask you. Can you
17 in a very brief and shorthand form go to the board
18 and outline the financial position of U.S. Tobacco
19 Company for the last three years?

20 A. Yes, I can.

21 MR. JENNINGS: May we have a continuing
22 objection?

23 THE COURT: Yes, sir.

24 A. Now, the financial position is the balance
25 sheet, and the balance sheet has three major parts to

1 it. One part is assets. The other part is
2 liabilities, and the other is equity.

3 Now, the assets represent what you own. For
4 example, in the case of an individual, it's your
5 house, your car, et cetera. Liabilities represent
6 what you owe, and so if you got a mortgage on your
7 house, what you still owe is a liability. If you
8 still owe on your car, then that is a liability. And
9 the equity is how much of your assets you really own.

10 So, in 1983 their assets were 280,860,000.
11 So to read this in terms of millions, it is 280.86
12 million.

13 Their liabilities were 95,330,000, and their
14 equity is or was 185,530,000. Of course, these are
15 rounded-off numbers, and so when it is actually
16 reported, they go right on down to the dollar, but it
17 makes it kind of cumbersome to write.

18 I'm sorry, I started at the wrong end.

19 This is 1981, so in 1983 it was 372.84,
20 112.80 and 260.04.

21 In 1984 it was 408.47 or 408,470,000. The
22 liabilities were 127,380,000, and the equity was
23 281,090,000.

24 In '85 it was 468,130,000. In liabilities
25 it was 1 million -- or 144,750,000. And the equity.

1 was 323,380,000 approximately.

2 Q. Doctor Horrell, tell us what is meant or
3 what the difference is between something's market
4 value and book value of the company.

5 A. Well, this equity that is here is known as
6 the book value. And that's what shows on the books,
7 but a publicly-traded company is also valued by the
8 market by the market value of their share of stock
9 times the number of shares that there are. And in
10 this particular case the market value of the company
11 in 1985 was 323,380,000, and -- excuse me, that's
12 book value -- and the market value was about 963
13 million.

14 Now, when you say that the market value was
15 a certain number for a particular year, that's got to
16 be some kind of average, because, as everyone knows,
17 the value of stock moves up and down in the course of
18 a year, and you have to decide at what point in time
19 are you going to evaluate the market value of the
20 company. This value of the company agrees with the
21 market value of -- as reported by some of the
22 standard reporting sources. Business Week had them
23 listed as a market value company of 1 billion 17
24 million, I think.

25 Q. Doctor Horrell, in order that we understand

1 a little more about what that number means, we have
2 all seen it in the news lately, stories about
3 takeovers of corporations. If somebody was going to
4 go into the market and buy up all the stock so they
5 could own this company, lock, stock and barrel, what
6 would they have to pay in order to buy and acquire
7 this company?

8 A. Well, assuming that the market didn't
9 realize what you were doing, you could buy it for
10 about 1 billion dollars. But once the market found
11 out, they would have a tendency to raise their
12 prices, knowing that you want it, and it would cost
13 you more than that.

14 Q. Is it fair to say that this is a 1 billion
15 dollar company in market value?

16 A. Well, that's an approximate figure. If I
17 was going to say, I would say between 850 million and
18 a billion would be a real good approximation.

19 Q. Let me ask you to explain to us about the
20 yearly financial operations again for the last three
21 years. If you want to, use a clean sheet of paper.

22 A. Now, the financial operation really operates
23 off of that basic formula I was talking about. You
24 got sales. You've got certain expenses that you take
25 out, and what's left is what you make that year. But

1 ordinarily in terms of keeping track of that, there
2 is a distinction made in terms of net before taxes
3 and then income taxes and net after taxes, and so
4 what I am putting up here will be sales. That
5 represents revenue, expenses, and then net before
6 tax.

7 Now, for '83 the sales figures were
8 \$382,780,000. The expenses were 246,240,000. The
9 net before taxes was 136,540,000.

10 The sales in 1984 were 443,790,000. In 1985
11 they were 480,020,000. The expenses were 283,880,000
12 for 1984. For 1985 they were 380,800,000. And the
13 net before taxes in 1984 was 159,910,000, and for
14 1985 it was 171,220,000.

15 Q. Doctor Horrell, when people get a paycheck
16 at the end of the month, they have got a net listed
17 on the paycheck, then they have to go home and pay
18 all their bills. Can you relate that to the numbers
19 or to the categories that you have got in the
20 left-hand column?

21 A. Well, businesses are a little bit different
22 than individuals, in the sense that the Internal
23 Revenue Service lets you take out all your expenses
24 from your sales to get a net before, and then this is
25 the number that they calculate your tax on. It is.

1 kind of like allowable deductions, only businesses
2 have more of them, and so this particular item
3 represents all of the operations for administration,
4 for maintenance of buildings, for --

5 Q. Salaries?

6 A. -- vehicles, salaries, cost of goods, all of
7 the things that go into the general operation and the
8 production of your product that would be offset from
9 this sales, which would then give you this net. And
10 so everything has been paid already and this is what
11 is left over as opposed to individuals get their
12 paycheck and the government takes something out of
13 the top, and then when you got back and figure tax at
14 the end of year, they let you make some deductions.
15 But basically the expenses are up front.

16 Q. Those numbers there at the bottom, that is
17 what they put in the bank after they have paid all
18 their bills?

19 A. Not quite, because Uncle Sam takes a big
20 chunk of this.

21 Q. Show us, skip down a little ways and show us
22 what would be left over after Uncle Sam takes his.

23 A. The net after tax figures for 1983 were
24 70,650,000. For 1984 it was 83,730,000. And for
25 1985 it was 93,530,000.

1 Now, that's in essence what they take to the
2 bank.

3 Q. Doctor, if for some reason in 1983 the
4 company had had an extraordinary expense, a one-time
5 bill for \$136,540,000 in addition to the expenses
6 that you have got shown there, what would that have
7 done to any of the rest of these numbers?

8 A. The only change that it would make is this
9 this number would move up and be added to this and
10 there would be a zero here. There would be a zero
11 here, and there wouldn't be any tax that year, and
12 then the other numbers would stay the same.

13 Q. Why don't you put 136 million up there above
14 the 246 or below -- That is a one-time expense of
15 \$136,540,000. Show us, put a line through the old
16 number for the net. Now, would an event like that
17 have any impact on any other numbers for 1984 or
18 1985?

19 A. Well, it would depend on what that event was
20 about. It's possible it could change those, but as
21 you described, it's an extraordinary one-time-only
22 kind of effect and it would not change any of those
23 numbers, no.

24 Q. All right. The company would still pay its
25 bills that year?

1 A. Oh, yes.

2 Q. Pay all of its employees?

3 A. Yes.

4 Q. Nobody would be out of work?

5 A. That's right.

6 Q. The company would still be in business?

7 A. Yes, sir.

8 Q. And the next year it could still make \$159
9 million before taxes or \$84 million after taxes?

10 A. Yes, sir.

11 Q. It would not destroy the company?

12 A. Oh, no it would not, in and of itself,
13 destroy the company, no.

14 Q. I take it if that happened on an unusual
15 basis, that would get somebody's attention within the
16 company.

17 A. Yes, I think it would.

18 Q. Doctor, I want you to compare, -- if you
19 would, you can go back to your seat.

20 Is there any aspect -- you have showed us
21 graphs of extremely rapid rate of growth of this
22 company. As a matter of fact, would you turn back to
23 that one time? I have got --

24 A. (Witness complies).

25 Q. The reason for the 64 -- I want to ask you.

1 to put a marker on there -- the evidence in this case
2 has shown that the Surgeon General in 1964 published
3 its first warning about the health hazards of
4 cigarettes.

5 Would you just put SG above the '64.

6 MR. JENNINGS: If the Court please, this is
7 argumentative. I object to it.

8 THE COURT: Overruled.

9 A. (Witness complies).

10 Q. (BY MR. BRALY) And then again where the '71
11 is, you might use the middle chart. Chairman of the
12 Board Bantle just testified that is when the
13 cigarette ads went off TV and smokeless tobacco ads
14 went on TV. Just put TV ads right there.

15 A. (Witness complies).

16 Q. Did you put TB or TV?

17 A. I thought tobacco, TV.

18 Q. Okay. Now, when did this company first do
19 anything other than just flat line of earnings?

20 A. Well, with respect to earnings, you can see
21 the pattern here, and then shortly thereafter there
22 is a startup and then after this point it
23 accelerates.

24 Q. So sometime not too long, a year or so after
25 the Surgeon General's report, earnings first started

1 up?

2 A. Well, they fluctuate a little bit, but, yes
3 that's the first place where you see a marked pattern
4 in the difference.

5 Q. That was the warning that cigarettes might
6 be hazardous?

7 A. (Nodding yes).

8 Q. And then '71 marks the point where he
9 started doing TV ads with smokeless tobacco and TV
10 ads for cigarettes came off. How would you
11 characterize the growth in earnings since that point
12 for this company?

13 A. They had been exceptional.

14 Q. Now, if you will, you mentioned this Fortune
15 500 a minute ago, said that in overall size this was
16 the 476th largest company in the country; is that
17 correct?

18 A. Yes, sir, I did.

19 Q. Besides that figure. In terms of its
20 profitability, is there anything that stands out
21 about this corporation as being unique among all of
22 the large corporations in the United States of
23 America?

24 A. Yes. On the Fortune 500 they rank the
25 companies by different criteria. One of them is by

1 revenue, and that's how U.S. Tobacco is 476th. But
2 they also look at a number of other different
3 dimensions, and one of those dimensions is the profit
4 margin on sales.

5 So if you looked at earnings and compared
6 after-tax earnings to revenue, then you would find
7 out what proportion of your revenue you are actually
8 getting as a net profit. And with respect to net
9 profit in 1985, U.S. Tobacco was No. 1 on the Fortune
10 500.

11 Q. You mean in that measure of profitability,
12 that it was more profitable than all of the other 500
13 largest corporations in the United States?

14 A. Yes, with respect to that measure, for sure.

15 Q. More profitable than Exxon?

16 A. Yes.

17 Q. Coca-Cola?

18 A. Yes.

19 MR. JENNINGS: If the Court please, --

20 THE COURT: Sustained.

21 MR. JENNINGS: -- this is argumentative.

22 THE COURT: Sustained.

23 MR. BRALY: I have nothing further. Thank
24 you, Doctor Horrell.

25 THE COURT: Ladies and gentlemen, we will

1 take our afternoon recess at this time. We will
2 recess until 3:30, with my usual admonitions to you,
3 and everyone remain seated while the jury exits until
4 approximately 3:30.

5 Court will be in recess.

6 THE COURT: Be seated. Cross-examine.

7 CROSS EXAMINATION

8 BY MR. JENNINGS:

9 Q. Doctor Horrell, whose earnings for 1985
10 would you rather have, Exxon's or U.S. Tobacco's?

11 A. Exxon's.

12 Q. By far, wouldn't you?

13 A. Yes, sir.

14 Q. You didn't mean to suggest that U.S. Tobacco
15 made more money than Exxon, did you?

16 A. No, no. I thought I clearly said that we
17 were talking about the rate of profit per dollar of
18 sales.

19 Q. Are there any other companies you can think
20 of whose profits you would rather have than U.S.
21 Tobacco's?

22 A. That I would rather have than U.S.
23 Tobacco's?

24 Q. Yes.

25 A. Or the profit.

1 Q. That made more money than U.S. Tobacco?

2 A. Yes, there are a lot of them.

3 Q. A lot of them?

4 A. Sure.

5 Q. Now, incidentally, when you talk about
6 Fortune 500, does Fortune 500 list all the
7 corporations in the country according to size?

8 A. Well, they go through the manufacturers,
9 they go through the service, and they talk about some
10 subcategories other than that in different issues.

11 Q. Well, actually they don't list AT&T?

12 A. Yes, AT&T.

13 Q. How about public utilities? Are they listed
14 in there?

15 A. Yes, in some of their lists public utilities
16 are ranked.

17 Q. Some of them, but not in what is known as
18 the Fortune 500?

19 A. Yes, it is not the manufacturers Fortune
20 500, which is probably a more correct terminology,
21 but usually the manufacturers do represent the
22 largest group.

23 Q. So you were talking about the manufacturers
24 Fortune 500?

25 A. Yes, sir.

1 Q. And that wouldn't include AT&T?

2 A. Yes, it does.

3 Q. Does include AT&T?

4 A. Yes.

5 Q. What other utilities does it include?

6 A. I don't know about other utilities. I don't
7 think it classifies AT&T as a utility, so I don't
8 think on the manufacturers list any other utilities
9 are listed.

10 Q. Thank you, sir.

11 THE COURT: Anything further?

12 MR. BRALY: I don't have anything further of
13 this witness, Your Honor.

14 THE COURT: You may step down. You are
15 excused.

16 Call your next witness.

17 MR. BRALY: Your Honor, we would at this
18 time like to play that portion of the film entitled
19 The Business of Pleasure, Plaintiff's Exhibit 344.
20 It is a 1979 film.

21 THE COURT: Come up.

22 MR. BRALY: We have got it cued up, I think,
23 where the Court can look at it.

24 (The following proceedings were had AT THE SIDE
25 BAR.)

1 MR. BRALY: Judge, what I propose to do is
2 the film describes all of the company's internal
3 operations. It is a film that was made for the
4 company. It describes a bunch of things that are not
5 directly relevant to this lawsuit. I would like to
6 play a portion of the first of it for a couple of
7 minutes that illustrates the smokeless tobacco
8 portion of it. I would like to fast forward through
9 to this portion that describes their sampling rodeos
10 and play about two minutes out of that. The two
11 minutes consist of some scenes at a rodeo, and it
12 consists of a man or a woman holding a box that's got
13 Copenhagen printed on the side just like it came out
14 of the assembly line, and they are throwing cans into
15 the crowd.

16 THE COURT: What does the defendant say?

17 MR. JENNINGS: If the Court please, we
18 object to it on the basis that they are seen within
19 the company film. It is not to be shown to the
20 public. Whether or not it represents an actual
21 event, I have no way of knowing, and I just don't
22 think it has any probative value.

23 MR. FINNEGAN: Further, Your Honor, I don't
24 think it adds anything to what has already been
25 testified to here. I mean we do appear at rodeo

1 events, and they do sample; and I am told, my people
2 at looked at it, that it's a Skoal product that's
3 being thrown into the crowd. Now, I have not seen
4 the film, Your Honor.

5 MR. BRALY: Judge, I can see it in slow
6 motion. It has Copenhagen on the box.

7 MR. FINNEGAN: I don't think that is really
8 the point in issue, Your Honor. I think this really
9 adds nothing to the evidence that has already been
10 introduced here.

11 MR. BRALY: Judge, with respect to their
12 argument that this doesn't add anything. The
13 evidence so far has been testimony by witnesses
14 outside the company as to their sampling activities,
15 which has been directly refuted by Mr. Garrison. We
16 thought he went outside the scope of direct in doing
17 that, but I understand the Court thought it was
18 convenient to go ahead and have that take place. But
19 he has done so.

20 This film is not evidence from some third
21 party. This film constitutes an admission by the
22 company, and those photographs speak in volumes and
23 they don't last ten seconds, the key to it, but in
24 order to understand the context of it, you would have
25 to see the 60 seconds before it and the 60 seconds

1 afterwards. But we think that constitutes a
2 corporate admission as to what their policies were.

3 THE COURT: I am going to sustain the
4 objection. The reason I am, not that it is not
5 relevant. I think it might be. I just think there
6 has been an abundance of testimony and evidence along
7 that vein. I think it would be redundant. I think
8 there's been an admission by the company that it is
9 handed out at public events at random, up and down
10 the aisles at football games, and I think even though
11 it would be redundant, I am going to sustain the
12 objection.

13 MR. BRALY: Note our offer of proof of the
14 film that it shows people holding factory cardboard
15 boxes labeled with Copenhagen that are at a rodeo and
16 they are throwing cans sort of like Frisbees into the
17 crowd, that nobody is asking for anybody's age, that
18 nobody is asking for anybody's ID, as has been
19 testified to by Mr. Garrison directly in this trial;
20 and we think that the evidence presented by this
21 internal company document constitutes an admission as
22 to the company practices that were intended to be
23 followed by the company.

24 THE COURT: Thank you.

25 MR. BRALY: We will submit it as a proposed

1 exhibit.

2 THE COURT: That's fine.

3 (The following proceedings were had IN OPEN
4 COURT.)

5 MR. BRALY: Your Honor, at this time, we
6 would like to read the stipulation with respect to
7 the statements by George Lazarus that were referred
8 to in the deposition of Mr. Bantle. The stipulation
9 is contained in the pretrial order.

10 THE COURT: Any objection to this?

11 MR. JENNINGS: No, Your Honor.

12 MR. BRALY: Could I get Your Honor to
13 explain the purpose of the stipulation?

14 THE COURT: I am not sure what this is.

15 MR. BRALY: All right. This is a
16 stipulation by the parties as to what the testimony
17 of George Lazarus, the reporter for the Chicago
18 Tribune, would have been with respect to these
19 statements.

20 The exhibit has already been shown to the
21 jury, but there is a stipulation as to what his
22 testimony would be as to the statements of the
23 chairman of the board had he been called as a
24 witness.

25 THE COURT: All right. Ladies and

1 gentlemen, when the parties stipulate to a fact or to
2 testimony, they are agreeing in this instance that if
3 a certain person, Mr. Lazarus, I believe it was, were
4 called to testify, that he would testify to certain
5 things. They don't necessarily agree that that
6 testimony is correct. They only agree that if he
7 were called to testify, that is what he would say.

8 Is that appropriately defined?

9 MR. JENNINGS: That is correct, Your Honor.
10 Of course, Mr. Bantle did not deny those statements
11 in his testimony.

12 THE COURT: I understand.

13 MR. BRALY: The stipulation of the parties
14 is that "the quoted portions of the newspaper story
15 from George Lazarus presented to Mr. Bantle during
16 his deposition may be introduced into evidence
17 without objection by the defendant by stipulation,
18 that if called to testify, the author of the story,
19 George Lazarus, would testify that Louis F. Bantle
20 made the quoted statements to George Lazarus. This
21 stipulation along with the quoted portions may be
22 read to the jury."

23 Thank you, Your Honor.

24 At this time we would also offer what has
25 been marked as Plaintiff's Exhibit 5. It is the

1 report of the National Cancer Advisory Board. We
2 have an authenticated copy with it, Your Honor.

3 THE COURT: Why don't you go ahead and offer
4 that, and I will take that up later.

5 MR. BRALY: Okay.

6 THE COURT: Give it to her.

7 (Handed to the clerk).

8 MR. BRALY: We would next call Hugh Foley by
9 deposition and we intend to read it since apparently
10 one of the machines has got to disappear in the
11 morning before we can get through it.

12 DIRECT EXAMINATION

13 BY MR. BRALY:

14 THE COURT: Who is Mr. Foley?

15 MR. BRALY: He is the head of corporate
16 affairs for U.S. Tobacco Company.

17 THE COURT: Is there anything we need to
18 take up before we start reading the deposition, or
19 can we take them up as we go?

20 MR. FINNEGAN: I think we can take them up
21 as we go, Your Honor.

22 THE COURT: Thank you.

23 HUGH W. FOLEY,
24 called as a witness on behalf of the plaintiff
25 by deposition, testified as follows:

DIRECT EXAMINATION

BY MR. BRALY:

Q. Mr. Foley, state your full name for the record, please.

A. My name is Hugh W. Foley.

Q. How are you employed, Mr. Foley?

A. I am employed by U.S. Tobacco Company.

Q. How old are you, Mr. Foley?

A. I'm 45 years old.

Q. How long have you been employed by the U.S. Tobacco Company?

A. I have been employed since February of 1981.

Q. And what was the first position that you held with U.S. Tobacco Company?

A. My position was manager of corporate affairs.

Q. What are the duties of the manager of corporate affairs?

A. Communications, legislative, primarily, those.

Q. What did you do before, immediately before coming to work for the United States Tobacco Company?

A. I was with the National Association of Tobacco Distributors.

Q. And what is that organization?

1 A. It's a trade organization, a national trade
2 association representing distributors of tobacco,
3 candy and other products.

4 Q. How long had you been with National
5 Association of Tobacco Distributors?

6 A. For one year.

7 Q. What had you done prior to that time?

8 A. Immediately prior to that I was with the New
9 York Chamber of Commerce and Industry.

10 Q. And prior to the employment with the New
11 York Chamber of Commerce and Industry?

12 A. I was with the Retail Merchants Association
13 of Houston, Texas.

14 Q. How long were you there?

15 A. Six years.

16 Q. Do you recall what years those were?

17 A. 1962 to 1968.

18 Q. How long were you with the New York Chamber
19 of Commerce and Industry?

20 A. For one year.

21 Q. So in 1968 you left the Retail Merchants of
22 Houston, Texas, and went to the New York Chamber of
23 Commerce and Industry?

24 A. Yes, sir.

25 Q. And you were there for one year?

1 A. Yes, sir.

2 Q. Then you went to work for the National
3 Association of Tobacco Distributors?

4 A. Yes, sir, that's correct.

5 Q. And you were there for how long?

6 A. For one year.

7 Q. That takes us up to about 1970.

8 A. I'm sorry, I -- if I said Sixties, it was
9 the Seventies.

10 Q. Okay.

11 A. I will make --

12 Q. That's the reason I started asking is
13 because it looked like we lost some years in there.

14 A. Yes.

15 Q. Okay. Then you would have been with the
16 Retail Merchants of Houston from 1972 to 1978?

17 A. Yes, sir, that's correct.

18 Q. All right. And prior to 1972 how were you
19 employed?

20 A. I was employed by several radio-television
21 stations in Houston, Texas.

22 Q. In what capacity?

23 A. In news, primarily as an editor, as a
24 reporter, as a manager.

25 Q. What was the reason for leaving the New York

1 Chamber of Commerce and Industry and going to the
2 National Association of Tobacco Distributors?

3 A. I was recruited by its managing director to
4 join the association.

5 Q. Okay. And tell the jury again what year it
6 was you went to work with United States Tobacco
7 Company.

8 A. 1981.

9 Q. What were the circumstances that caused you
10 to change jobs and join the United States Tobacco
11 Company?

12 A. I was fired by the managing director of the
13 NATD. I had become acquainted with some people at
14 U.S. Tobacco and I was hired at that point by them.

15 Q. What are the duties associated with the job
16 that you first held with U.S. Tobacco Company?

17 A. As I stated, communications or public
18 relations and legislative.

19 Q. What do you mean by "communications"?

20 A. Information gathering. I was the spokesman
21 for the company for a period of time, basically those
22 responsibilities.

23 Q. For how long were you a spokesman for the
24 company?

25 A. Until spring of 1985.

1 Q. Is there somebody else that is now a
2 spokesman for the company?

3 A. Yes, sir.

4 Q. And who is that?

5 A. That would be Larry Allen.

6 Q. And he became the spokesman in the spring of
7 1985?

8 A. Yes, sir.

9 Q. Have you held any other positions with the
10 United States Tobacco Company besides the one you
11 just described?

12 A. No, sir. I'm still manager of corporate
13 affairs.

14 Q. What did you know about snuff before you
15 went to work for the National Association of Tobacco
16 Distributors?

17 A. Virtually nothing.

18 Q. I take it at that time that you didn't know
19 anything about snuff and you didn't know anything
20 about any health hazards associated with snuff,
21 because you just didn't know anything about the
22 subject at all.

23 A. I just didn't know anything about the
24 subject, yes, sir.

25 Q. So at the time that I guess about 1980 that

1 you went to work for the National Association of
2 Tobacco Distributors, you had not heard of any health
3 hazards associated with snuff; is that correct?

4 A. That's correct.

5 Q. You didn't have any knowledge of that?

6 A. No, sir.

7 Q. Where did you go to high school?

8 A. Highland Park High School, Dallas, Texas.

9 Q. What years did you graduate?

10 A. 1958.

11 Q. And that's a fairly wealthy and affluent
12 suburb in Dallas, Texas, isn't it?

13 A. Parts of it, yes, sir.

14 Q. And after you left Highland Park High
15 School, did you graduate college?

16 A. After high school I went into the military
17 service.

18 Q. How long were you there in the military?

19 A. For four years.

20 Q. After you got out of the military, what did
21 you do?

22 A. I went to college then.

23 Q. And where did you go to college?

24 A. I went to -- first to Lamar University in
25 Beaumont, Texas, and I graduated from the University

1 of Houston.

2 MR. JENNINGS: Excuse me. I object to the
3 next question, the question --

4 THE COURT: I'm sorry. What page are you
5 on?

6 MR. BRALY: Page 8, Line 15.

7 Your Honor, we will offer it. I understand
8 the Court has already ruled on it, and I will skip it
9 with the understanding that we offer it.

10 THE COURT: That's Line 15 through 18?

11 MR. JENNINGS: 23, Your Honor.

12 MR. FINNEGAN: 23, Your Honor.

13 THE COURT: Go ahead. Sustained. Go ahead.

14 Q. Proceeding on. What was your degree at
15 college in Houston?

16 A. I have a BA in political science.

17 Q. You went straight out of there to work for
18 the Retail Merchants Association of Houston, Texas?

19 A. Yes, sir, approximately the same time. I
20 worked my way through college.

21 Q. That is hard and sometimes takes a little
22 longer, doesn't it?

23 A. Yes, sir, it does.

24 Q. What kinds of jobs did you hold while you
25 were working your way through college?

1 A. As I stated, I worked in broadcast news
2 primarily.

3 Q. So you were -- When you say "broadcast
4 news," are you talking about news gathering and
5 reporting?

6 A. Yes, sir.

7 Q. Would you consider that a person has to be
8 fairly well informed and educated to properly do
9 those kinds of jobs?

10 A. I would like to think so, yes, sir.

11 Q. What is involved in doing the -- I believe
12 you used the word legislative work as part of the
13 office or the manager of corporate affairs duties.

14 A. It has varied over the past five years. We
15 have a larger staff now than we had five years ago.
16 It involved for me tracking legislation, maintaining
17 contact with state trade associations, making some
18 legislative contact. Those would be the basic areas
19 of it.

20 Q. Are you a member of any committees within
21 the U.S. Tobacco Company?

22 A. Yes, sir, I am.

23 Q. Would you describe those, please.

24 A. I am on the political action committee. I
25 serve on the corporate contributions committee, and I

1 am an alternate member of the state relations
2 committee or industry relations committee, excuse me.

3 Q. What is the political action committee?

4 A. It is a federal political action committee,
5 and there is a state political action committee for
6 the state of Connecticut.

7 Q. What is the function or purpose of your
8 federal political action committee?

9 A. To raise money from eligible employees, make
10 contributions to federal candidates as -- under the
11 federal election law.

12 Q. Does the United States Tobacco Company make
13 contributions to federal candidates for Congress?

14 A. No, sir, the company does not.

15 Q. However, the company organizes and you work
16 on a company-sponsored political action committee and
17 that committee does make those contributions?

18 A. Yes, sir.

19 Q. What is the committee on corporate
20 contributions?

21 A. The committee on corporate contributions
22 reviews requests from charities, nonprofit
23 organizations of a variety of sorts and recommends
24 contributions to those -- those groups.

25 Q. What is the industry relations committee?

1 A. In five years I am not sure that committee
2 has ever met. I really don't know.

3 Q. So in the five years that you have been with
4 the company, you are not aware of any meetings having
5 taken place of the industry relations committee?

6 A. That's correct.

7 Q. And that would be the period of time from
8 1981 to 1986?

9 A. Yes, sir.

10 Q. Looking through the documents of U.S.
11 Tobacco Company, I have noticed a program called an
12 honorarium program. Would you tell the jury what
13 that is about, please.

14 A. The honorarium program is not in my area of
15 responsibility. I can tell you what I know, but it
16 is not in my department, or it is not in my
17 responsibility.

18 Q. Tell us what you know or believe you know on
19 that subject.

20 A. Over the -- a period of time that I can't
21 tell you exactly how long, the company has invited
22 members of Congress to come and brief groups on
23 issues on the state of -- state of Congress. That's
24 essentially what the honorarium program, as far as I
25 know, is.

1 Q. Congressmen are given what you
2 euphemistically call an honorarium for coming and
3 doing this, aren't they?

4 A. Yes, sir, in some instances, to my
5 knowledge, those payments have been made to
6 designated charities of those members.

7 Q. I am not sure I understand your answer. Are
8 you saying that always happens?

9 A. No, sir, I am saying sometimes it does.

10 Q. On other occasions the money goes to the
11 Congressman?

12 A. I understand that that is a legal process,
13 sir.

14 Q. And how much are those honorariums?

15 A. I don't know.

16 Q. You have no idea?

17 A. No, sir.

18 Q. Do you know the names of any of the
19 Congressmen that have been so honored?

20 A. Not offhand, no, sir.

21 Q. Do you know how many of them there have
22 been?

23 A. No, sir, I do not.

24 Q. Have there been more than half a dozen?

25 A. I really don't know.

1 Q. You don't have any idea?

2 A. No, sir.

3 Q. Don't you attend these functions when the
4 Congressmen show up?

5 A. Not in the past about year-and-a-half.

6 Q. Prior to that time, you did?

7 A. Yes, sir.

8 Q. How many times did that happen in the
9 three-and-a-half years before that?

10 A. In the period from '81 to the beginning of
11 '84?

12 Q. Yes, sir.

13 A. Fewer than 10.

14 Q. That you are aware of?

15 A. Yes, sir.

16 Q. Now, does the U.S. Tobacco Company maintain
17 a program of periodic visits to Washington to meet
18 with Congressmen?

19 A. We have in the past, and as I stated, I have
20 not been involved in that area for more than a year.
21 I don't know what the plans are.

22 Q. That has been done in the past?

23 A. Yes, sir, it has.

24 Q. During those visits on occasions you would
25 meet with a fairly substantial number of the members

1 of Congress, wouldn't you?

2 A. Yes, sir.

3 Q. More than a dozen?

4 A. Yes, sir.

5 Q. More than two dozen?

6 A. It would depend on the event, the part of
7 the visit.

8 Q. What is the most that you have ever met with
9 on any one of those expeditions to Washington?

10 A. You mean at a given event or --

11 Q. Yes.

12 A. It would be strictly a guess, Mr. Braly, but
13 I think it would be in the range of 20 or 25.

14 MR. JENNINGS: If the Court please, may we
15 approach the bench.

16 THE COURT: Yes, sir.

17 (The following proceedings were had AT THE SIDE
18 BAR.)

19 MR. JENNINGS: I think at this point --

20 MR. BRALY: I am going to skip to Line 14,
21 so if you have got some objection --

22 MR. JENNINGS: I think at this point I would
23 request the Court to instruct the jury that the U.S.
24 Tobacco Company has a constitutional right to contact
25 Congressmen, to be involved in the political process.

1 THE COURT: What would you want me to say?
2 Just that?

3 MR. JENNINGS: We will let the Court choose
4 the wording that is appropriate, but I think the
5 impression is being left that there is something
6 illegal or improper about having contact with --

7 THE COURT: I would not mind saying that the
8 company has a right under the Constitution to contact
9 their Congressmen and petition Congress and have
10 dealings with Congressmen, but the evidence is being
11 offered only on the issue of what, if anything, was
12 done in regard to warnings. Is that --

13 MR. BRALY: That will be fine with me.

14 THE COURT: Is that --

15 MR. JENNINGS: That's okay.

16 MR. FINNEGAN: Thank you, Your Honor.

17 (The following proceedings were had IN OPEN
18 COURT.)

19 THE COURT: Ladies and gentlemen, there is
20 testimony come out previously and at this time
21 concerning the company's contacts with Congressmen
22 and other government officials in Washington. Let me
23 advise you that a company such as this certainly has
24 a constitutional right to deal with a Congressman and
25 to contact a Congressman and have contact with public

1 officials in Washington, and no one is suggesting to
2 the contrary. The only reason this evidence is
3 admitted at all is for the purpose of showing what,
4 if anything, the company did in regard to warnings on
5 their product.

6 Go ahead.

7 MR. BRALY: The question at Line 14.

8 Q. Did the United States Tobacco Company issue
9 instructions to the people working in the field with
10 respect to what they were to say if some consumer
11 inquired about the -- some problem, health problem,
12 associated with the use of smokeless tobacco?

13 A. I'm not sure specifically there. We have in
14 areas where I was working in the past issued memos,
15 directing field people to contact corporate
16 headquarters. I am not sure specifically as you
17 stated the question.

18 Q. Well, what instructions were given to your
19 field people as to how to handle inquiries about
20 health hazards associated with smokeless tobacco?

21 A. Mr. Braly, the area in which I am familiar
22 was -- or is that at one point the field people were
23 told if they were contacted by the media, that those
24 calls were to be referred to Greenwich.

25 Q. To your office?

1 A. To the corporate affairs office, yes, sir.

2 Q. That was your office then.

3 A. Yes, sir.

4 Q. Any other instructions?

5 A. Not that I am aware of, sir.

6 Q. The employees that worked out in the field,
7 to the best of your knowledge, then, were not given
8 any instructions as to a particular statement or
9 response they were supposed to make if somebody asked
10 about a health problem with one of your snuff
11 products?

12 A. I believe, Mr. Braly, to the best of my
13 recollection, that they were told the position of the
14 company and I believe they were provided a brochure
15 prepared by the Smokeless Tobacco Council to which we
16 belong.

17 Q. Mr. Foley, isn't it a fact that they were
18 specifically instructed to make a short statement
19 that it had never been proven that smokeless tobacco
20 caused any harm and to say absolutely nothing else
21 and refer all other matters back to your office?

22 A. The position of the company, Mr. Braly, is
23 that it has not been scientifically established that
24 use of smokeless tobacco products has been proven to
25 cause any human disease or oral cancer. If they were

1 so instructed, I believe that would have been the way
2 it would have been stated.

3 Q. Well, I am asking you, were they so
4 instructed?

5 A. I don't recollect the specific language of
6 the instructions, Mr. Braly.

7 Q. Well, Mr. Foley, tell the jury what you do
8 recollect.

9 A. It is my recollection that the position of
10 the company, as I have stated it, was included and
11 that I do remember that if any -- they were
12 approached by the news media, that that was the
13 responsibility of the corporate affairs department
14 and those calls should be referred to us.

15 Q. Weren't they given a set of instructions
16 that said if they were asked about health issues,
17 that the proper response to a question like that is
18 that there has never been anything proven to support
19 the notion that smokeless tobacco is harmful and if
20 the consumer persists on this issue, simply tell them
21 this is all you know, and if they need any other
22 information, to contact U.S. Tobacco Public Affairs
23 Department in Greenwich, Connecticut, at Area Code
24 203, 661-1100.

25 THE READER: The answer at the top of page.

1 20.

2 MR. BRALY: Yes.

3 A. I have never seen this document before, Mr.
4 Braly.

5 Q. (BY MR. BRALY) Well, Mr. Foley, isn't that
6 in fact what the people were instructed to do,
7 irrespective of whether you have ever seen that
8 particular piece of paper?

9 A. I don't know that, Mr. Braly. I also don't
10 know where it was marked by the stamp.

11 MR. BRALY: Skip to Page 21, Line 24.

12 Q. Mr. Foley, isn't it the fact that all of the
13 people working for U.S. Tobacco Company were
14 instructed that if they were contacted on health
15 questions, they were to contact your office?

16 A. Yes, sir.

17 Q. So they weren't to provide any useful
18 information to concerned consumers; is that correct?

19 A. It's my recollection, Mr. Braly, that people
20 in the company were provided with the company's
21 position and that -- so information could be
22 coordinated at one point, questions from the field on
23 a variety of subjects were referred to the corporate
24 affairs department, yes, sir.

25 Q. And the information that was provided to

1 those people in the field was to deny that there was
2 any hazard associated with smokeless tobacco; is that
3 correct?

4 A. No, sir. The company's position is that use
5 of the product has not been scientifically
6 established as a cause of any human disease,
7 including oral cancer.

8 Q. Mr. Foley, will you tell the jury that that
9 doesn't mean that that's a denial that smokeless
10 tobacco causes any harm? Isn't that the way you
11 understand that phrase, this stuff doesn't cause any
12 harm?

13 A. No, sir, I'm not saying that.

14 Q. What are you saying? How do you interpret
15 that phrase?

16 A. That it has not been proven as a cause of
17 any human disease, including oral cancer.

18 Q. Does that mean that it is a product of which
19 you can all be proud of?

20 A. The company is proud of its products, yes,
21 sir.

22 Q. And the company would not be proud of a
23 product that was not a safe product, would it?

24 A. As I stated, Mr. Braly, the company's
25 position that it has not been scientifically

1 established as a cause of any human disease,
2 including oral cancer.

3 Q. Mr. Foley, my question was the company would
4 not be proud of a product that was not a safe
5 product, would it?

6 A. Not be proud of a not --

7 Q. Are you having some difficulty with that
8 question?

9 A. Yes, sir, I am.

10 Q. Your company takes the position it is proud
11 of its products, right?

12 A. Yes, sir, we do.

13 Q. Would your company be proud of a product if
14 it was not safe?

15 A. The company, it is my understanding, Mr.
16 Braly, while taking the position I have stated, has
17 not said that the product is safe or not safe.

18 MR. BRALY: The court reporter read back the
19 last question, which was "Would your company be
20 proud of a product if it was not safe"?

21 A. I'm not sure I understand what you mean by
22 "safe," Mr. Braly.

23 Q. (BY MR. BRALY) Mr. Foley, --

24 MR. BRALY: Whereupon the question was read
25 again. The question being: "Would your company be

1 proud of a product if it was not safe?

2 THE READER: I'm at page 25, Line 17?

3 MR. BRALY: Yes.

4 A. I'm still not certain that I understand how
5 you are defining "safety" or "safe," Mr. Braly.

6 Q. Well, tell me how you define the word, then,
7 sir.

8 A. I'm not sure I can give you an adequate
9 definition, Mr. Braly, of what the word means.
10 That's why I asked you if you would explain to me
11 what you were asking.

12 Q. Mr. Foley, are you telling the jury in this
13 trial that you don't understand what the word "safe"
14 means used in the context of that question?

15 A. That's correct, sir.

16 Q. You have used a phrase today and that is
17 that it has not been scientifically established that
18 this product causes any disease in humans. I presume
19 you understand that phrase that you have used several
20 times already today.

21 A. Yes, sir.

22 Q. Would you tell the jury what you mean by
23 "scientifically established"?

24 A. That it has not been shown as a cause of any
25 human disease, including oral cancer.

1 MR. BRALY: Whereupon the court reporter
2 read back the last question, which was: "Would you
3 tell the jury what you mean by scientifically
4 established."

5 A. I would take that to mean my own definition,
6 Mr. Braly, would be proven.

7 Q. So you understand what the phrase
8 "scientifically established" means; is that correct?

9 A. Yes, sir, I believe I do.

10 Q. And you understand what that phrase means
11 when it is used within the context of the statement
12 that smokeless tobacco has not been scientifically
13 established to be a cause of any human disease?

14 A. Yes, sir.

15 Q. But you are telling the jury under oath
16 today, that you don't understand what the word "safe"
17 means, when I asked you if your company would be
18 proud of a product that is not safe?

19 A. I'm -- It's not so much that, sir. I am
20 still having trouble understanding your question.

21 Q. I understood a minute ago that your problem
22 with the question was you didn't understand what the
23 word "safe" means. Do you now understand what the
24 word "safe" means?

25 A. No, sir, I don't think I do in the context.

1 of the question.

2 Q. If you don't understand what the word "safe"
3 means, do you suppose that there's lots of other
4 people out there don't understand it, either?

5 A. I really don't know.

6 Q. But you do understand what the words
7 "scientifically established" mean; is that correct?

8 A. I'm a lay person, not a scientist. I have
9 an understanding, yes, sir.

10 Q. You have a working understanding of the
11 words "scientifically established"?

12 A. Yes, sir.

13 Q. But you don't have a working understanding
14 of the word "safe"? Is that what I am to gather from
15 your statements?

16 A. Are you saying -- I just don't understand
17 the way you are asking the question.

18 Q. The question is would your company be proud
19 of a product that was not safe.

20 A. I'm still having trouble with that, Mr.
21 Braly. I apologize.

22 Q. Let me see if I can help you, Mr. Foley.
23 Let me see if I can ask you that question another
24 way.

25 A. Okay.

1 Q. Maybe you and the jury can understand it a
2 little easier. Would U.S. Tobacco Company stand and
3 say they were proud of a dangerous product?

4 A. Again, Mr. Braly, I'm not sure how you are
5 using the word "dangerous." I'm confused, and I
6 apologize.

7 Q. So you are telling the jury that you
8 understand what the words "scientifically
9 established" mean, but you do not understand what the
10 word "safe" means, and you do not understand what the
11 word "dangerous" means; is that correct?

12 THE READER: You will have to cue me to
13 where the question is answered.

14 MR. BRALY: All right. There was some
15 objection, the question again at Line 22 on Page 29.
16 I will pick up there.

17 Q. (BY MR. BRALY) I am going to ask the
18 question one more time then, Mr. Foley, and I will
19 note Mr. Finnegan's continuing objection so he
20 doesn't have to repeat the objection so as to
21 interrupt your train of thought.

22 Are you telling the jury that you understand
23 what the words "scientifically established" mean, but
24 that you do not understand what the word "safe" means
25 and you did not understand what the word "dangerous"

1 means?

2 A. I think what I don't understand, Mr. Braly,
3 is the use of the words in the question that you
4 asked me.

5 Q. Are you telling the jury that you cannot
6 comprehend the question that I stated as follows:
7 "Would the United States Tobacco Company be proud of
8 a product that is dangerous?"

9 A. And as I stated, sir, I have to ask for a
10 definition of the word in your question to understand
11 it well enough to answer it.

12 Q. But you don't have to ask for a definition
13 of the words "scientific established" in order to use
14 that pat phrase, do you?

15 A. Could I ask you to state the question again,
16 now.

17 Q. Sure, I will have the court reporter read it
18 back to you.

19 But you don't have to ask for a definition
20 of the words "scientific established" in order to use
21 that pat phrase, do you?

22 A. I don't consider the company's position to
23 be a pat phrase, Mr. Braly.

24 MR. BRALY: The question was reread.

25 Q. But you don't have to ask for a definition

1 of the words "scientifically established" in order to
2 use that pat phrase, do you?

3 A. No, sir, I do not.

4 Q. So now you are telling me that you are using
5 the phrase, but you don't understand what
6 "scientifically established" means? Mr. Foley,
7 didn't you just --

8 MR. BRALY: I am on Page 32.

9 Q. Mr. Foley, didn't you just a moment ago tell
10 the jury that you didn't have to understand what the
11 words "scientifically established" meant in order to
12 use that phrase?

13 A. I understood it in the context of the
14 question, Mr. Braly. I didn't understand the other
15 terms in the context of the questions. That's where
16 I am confused.

17 Q. I want to try and summarize this and bring
18 this line of questioning to a close. Do I understand
19 you correctly that you are telling the jury under
20 oath that you do understand what the term
21 "scientifically established" means?

22 A. As a lay person, yes, sir.

23 Q. In the context of that phrase that you used,
24 but that you do not understand what the word "safe"
25 means in the context of the question that I asked in

1 that respect, and you do not understand what the word
2 "dangerous" means in the context of the question in
3 which I use that word?

4 A. I'm not sure that I do, Mr. Braly.

5 MR. BRALY: Excuse me. I believe there's
6 another question that needs to come in.

7 The question is:

8 Q. (BY MR. BRALY) Mr. Foley, do you understand
9 the question?

10 A. I am not sure that I do, Mr. Braly.

11 Q. All right. In order to make it quite
12 simple, and therefore maybe somewhat plainer, are you
13 telling the jury that you understand what the words
14 "scientifically established" mean when I used the
15 phrase "smokeless tobacco has not been scientifically
16 established to be a cause of any human disease"?
17 "Yes" or "no"?

18 A. Yes, sir.

19 Q. Are you telling the jury that you do not
20 understand what the word "safe" means when I ask you
21 if the U.S. Tobacco Company would be proud of a
22 product that is not safe?

23 A. That is correct, sir.

24 Q. And you don't understand what "safe" means
25 in that phrase in that question?

1 A. In your question, yes, sir.

2 Q. And, likewise, when I ask that question in
3 the converse form, that is, would the United States
4 Tobacco Company be proud of a dangerous product, you
5 don't understand what the word "dangerous" means?

6 A. That's correct, sir.

7 Q. Mr. Foley, has the U.S. Tobacco Company ever
8 used an advertising slogan --

9 MR. JENNINGS: Excuse me, if the Court
10 please --

11 MR. FINNEGAN: May we approach the bench.

12 THE COURT: What line are we on?

13 MR. FINNEGAN: We are on Line 34, Your
14 Honor.

15 MR. JENNINGS: Page 34, Line 9.

16 (The following proceedings were had AT THE SIDE
17 BAR.)

18 MR. FINNEGAN: If the Court please, this
19 testimony relates to Skoal Bandits taking a pouch
20 instead of a puff, and the Attorney General of the
21 State of New York, I believe the Court has ruled that
22 that's not admissible in another context. Within the
23 last day or so.

24 MR. BRALY: I don't think Skoal Bandits were
25 ever mentioned.

1 MR. JENNINGS: That's where the slogan --

2 MR. FINNEGAN: That's where the slogan comes
3 from, is take a pouch instead of a puff. And this
4 goes down to the bottom of Page 35, Your Honor.

5 THE COURT: What do you say, Mr. Braly?

6 MR. BRALY: No. 1, they didn't object to it
7 during the deposition and, two, it doesn't mention
8 Skoal Bandits. I am simply asking about their
9 advertising slogan.

10 THE COURT: I will sustain the objection.

11 MR. FINNEGAN: Thank you, Your Honor.

12 THE COURT: That will go down to --

13 MR. FINNEGAN: The last line --

14 THE COURT: I think we start on Line 3 on
15 page 36, I believe, would be the --

16 MR. FINNEGAN: Thank you.

17 (The following proceedings were had IN OPEN COURT.)

18 Q. Mr. Foley, let me hand you what has been
19 marked as the Plaintiff's Deposition Exhibit No. 2.
20 Can you tell the jury what that document is?

21 MR. FINNEGAN: Mr. Braly, --

22 May we approach the bench, Your Honor?

23 (The following proceedings were had AT THE SIDE
24 BAR.)

25 MR. FINNEGAN: If the Court please,

1 Deposition Exhibit No. 2 deals with letter writing
2 activities and other political activity, but it has
3 nothing to do with any warning label or any warning
4 issue. It is just a way in which they can reach out
5 to people in the tobacco family and communicate with
6 them. This does not relate to any of the warning
7 issues which I understood to be the basis of the
8 Court's ruling on political activity.

9 THE COURT: Is this necessary?

10 MR. BRALY: Well, Judge, it just ties in
11 with the rest of his testimony as a part of the
12 whole -- when he finally gets around to testifying
13 about how many members of Congress and their staff
14 were at the meeting in Washington. It sets forth
15 their Washington Congressional visits on the second
16 page of the document, reinforcing the management's
17 contacts with members of Congress and important
18 members of the executive branch.

19 THE COURT: What is your objection? I am
20 not sure what --

21 MR. FINNEGAN: Well, this doesn't really
22 relate to any visits to Washington specifically with
23 regard to the warning issue, Your Honor. This is
24 just sort of a general way in which the company keeps
25 up its political contacts. This doesn't indicate

1 that they did go to Washington to do this.

2 THE COURT: Is it really worth much
3 argument, because there is an abundance of evidence
4 about their contacts.

5 MR. BRALY: We have an abundance.

6 THE COURT: I will sustain the objection to
7 Defendant's Exhibit -- well, it is Deposition Exhibit
8 2.

9 MR. FINNEGAN: Where does it pick up with,
10 the testimony?

11 THE COURT: Why don't we skip over to --

12 MR. BRALY: Actually, it starts, Judge, the
13 document is deleted until Page 39, where I ask him
14 the question point blank, so we need the document
15 because it is the foundation for the question at Line
16 16.

17 MR. FINNEGAN: Which question?

18 MR. BRALY: Line 16, Page 35. The document
19 was the foundation for that question. I don't have
20 to introduce the document, if I can just read the
21 man's testimony, Your Honor.

22 THE COURT: Any objection to that?

23 MR. FINNEGAN: We do, Your Honor, but we
24 understand the Court's ruling and if that comes
25 within it, then --

1 THE COURT: I am not clear. On what Page
2 42, what are you trying to show here? You are far
3 afield here, political action committees
4 and --

5 MR. BRALY: Judge, let me see if I can find
6 it, a chunk here. I agree some of this does get far
7 afield.

8 MR. FINNEGAN: If the Court please, I would
9 also like to point out that the next exhibit was
10 generated after the decedent's death, and that goes
11 on, according to my markings for sometime.

12 MR. BRALY: The record starts talking
13 specifically about the association between health
14 issues and youth issues.

15 THE COURT: I am going to sustain the
16 objection on this exhibit and the testimony about it.
17 If it is relevant at all, I think it is just so
18 tangential that I don't think it is necessary. I
19 think it is redundant and --

20 MR. BRALY: Your Honor, skipping from 46 all
21 the way to the bottom of 48.

22 MR. FINNEGAN: 46 to 49 deals with Skoal
23 Bandits.

24 MR. BRALY: Your Honor, with respect to the
25 first document --

1 THE COURT: Excuse me.

2 MR. BRALY: With respect to the first
3 document, the only thing that I am really concerned
4 about getting in is the testimony there on Page 39,
5 starting at Line 10 where he says that this would
6 include activities on the issue of proposed
7 legislation to put warning labels on smokeless
8 tobacco. All I want to do is lay a foundation to get
9 that in.

10 THE COURT: I will allow that question. You
11 can read the question and -- from Line 10 through
12 Line 19 on Page 39.

13 MR. BRALY: It starts with the answer on
14 Line 10.

15 THE COURT: Yes.

16 MR. BRALY: I will just let him start with
17 the answer, read, that will be sufficient.

18 THE COURT: Now, it appears that the next
19 line of questioning involves Skoal Bandits, and the
20 way I have read it, it goes down to Line 8 on Page
21 51, where it talks about --

22 MR. BRALY: Well, through the top of 46, the
23 answer that he gives, says, "It's my understanding,
24 Mr. Braly, that there are and have always been a
25 number of work places where smoking was prohibited or

1 dangerous and that our products have been offered as
2 an alternative to the tobacco user --

3 THE COURT: What is the relevance of that?

4 MR. BRALY: Safe alternative to cigarettes.

5 THE COURT: They are talking there though
6 about safe as far as it's not safe for health
7 reasons. They are just talking about it being less
8 dangerous than the cigarette to use.

9 MR. BRALY: I think there is a good
10 inference, if you don't see it that way, I doubt if
11 the jury will, either, so let's press on to 51.

12 THE COURT: Page 51, it is talking about
13 "Pic n' Chews"?

14 MR. BRALY: Yes.

15 THE COURT: Is there an objection to that?

16 MR. FINNEGAN: If the Court please, --

17 MR. JENNINGS: Page 51.

18 MR. FINNEGAN: If the Court please, this is
19 another document which deals with general activities
20 of the company. I don't believe that this has
21 anything to do with knowing, lobbying on a warning
22 issue. They did make visits to Congress. This is a
23 little piece within the company that talks about
24 that.

25 MR. BRALY: Well, Judge, one of the

1 questions ends up with --

2 THE COURT: I'll tell you what. On this, I
3 will allow in the questioning, but I just don't think
4 that is going to be helpful, the exhibit, itself.

5 MR. BRALY: That should take us through the
6 end of the day.

7 MR. FINNEGAN: Okay that goes from 51 to
8 where, 55?

9 THE COURT: Yes, on the middle of 55.

10 MR. FINNEGAN: I believe I have an objection
11 to Exhibit 6, but you want to go through and take it
12 to 55?

13 THE COURT: Yes.

14 MR. BRALY: Go back to 35.

15 (The following proceedings were had IN OPEN
16 COURT.)

17 Q. (BY MR. BRALY) If you would, please, look
18 at Page 39.

19 A. I have it.

20 Q. And call your attention to Line 10. There
21 is an answer there. Would you commence with that
22 answer, sir?

23 A. The goal or the recommendation of this memo
24 was based on the system that a great many companies
25 use, Mr. Braly, and that is to get their employees

1 and others involved in the event of legislative
2 activity so that they could express their opinion at
3 the time, at the appropriate time.

4 Q. That would include their opinion on proposed
5 legislation to put warning labels on smokeless
6 tobacco; correct?

7 A. Yes, sir.

8 THE COURT: I think I would start at Line 3
9 on Page 52, Mr. Braly.

10 MR. BRALY: All right.

11 THE COURT: I think that will be
12 appropriate.

13 MR. BRALY: Page 52, Line 3.

14 Q. Mr. Foley, earlier in your testimony you
15 mentioned that you had only contacted a couple of
16 dozen Congressmen and Senators. Isn't it true that
17 this document reflects that on this political
18 involvement committee meeting in Washington that you
19 made personal calls on Capitol Hill among 33 senators
20 and representatives. Excuse me, 83. I beg your
21 pardon.

22 A. As I read that paragraph, Mr. Braly, it says
23 that members of our political involvement committee
24 paid personal calls and that a combination of 83
25 senators, representatives and some of their senior

1 staff members attended separate luncheons..

2 Q. Would you read the caption under the
3 photograph on the first page to the jury, please.

4 A. It says, "More than 500 Congressional
5 committee staffers and members attended U.S.
6 Tobacco's reception."

7 Q. Are you telling the jury that the U.S.
8 Tobacco Company conducted a reception in the famous
9 caucus room of the Russell Senate Office building on
10 June the 2nd and that more than 500 Congressional
11 committee staff members attended that function
12 sponsored by the United States Tobacco Company?

13 A. Yes, as is noted, Congressional committee
14 staff made up of the attendees, there were some
15 members there, yes, sir. I believe earlier I was
16 referring to a later visit that you had asked me
17 about when I asked you which year you were referring
18 to.

19 Q. The other pages all have what I remember
20 from college as being "party pics," snapshots taken
21 at this function that have been included; is that
22 correct?

23 MR. BRALY: I am going to ask that Mr.
24 Finnegan state his objection, because the witness
25 adopted it. I would be glad to read it if he doesn't

1 want to.

2 MR. FINNEGAN: Go ahead and read it.

3 MR. BRALY: Line 20, by Mr. Finnegan.

4 MR. FINNEGAN: I will read that. I state
5 for the record that these are not candid shots. They
6 are photographs of various people working at the U.S.
7 Tobacco and people from Congress.

8 Q. (BY MR. BRALY) Mr. Foley, would you like to
9 adopt your attorney's description of what those
10 photographs are?

11 A. I would say, Mr. Braly, they were a report
12 on this Congressional visit to the eligible members
13 of the political involvement committee to whom this
14 newsletter was mailed.

15 Q. And those are photographs of various members
16 of U.S. Tobacco and members of Congress and their
17 staff that were taken at this function in which 500
18 people or more attended?

19 A. No, sir.

20 Q. They are not?

21 A. No, sir, they're not. Some of them may be,
22 but not all of them were.

23 Q. All right. The visit covered several
24 days --

25 A. The visit covered several days, if you

1 notice, June 1 through 3 in Paragraph 1.

2 Q. So it was a three-day visit then to
3 Washington?

4 A. Two-and-a-half, three, yes, sir.

5 Q. Over which these photographs were taken?

6 A. Yes, sir.

7 Q. Is this a regular publication of the
8 political involvement committee of the United States
9 Tobacco Company?

10 A. It was until -- well, it was my
11 responsibility until the beginning of last year. I
12 have not been involved in this since that time.

13 Q. The answer to my question is that, yes, it
14 is a regular publication of the U.S. Tobacco
15 political involvement committee.

16 A. I don't know whether it is or not right now.

17 Q. It was while you were running it?

18 A. Yes, sir.

19 THE COURT: Ladies and gentlemen, we are
20 going to go ahead and recess now for the afternoon a
21 little early today. We will reconvene tomorrow at
22 9:30 with my usual admonitions to you for the
23 evening. You will be excused until 9:30 in the
24 morning.

25 Everyone remain seated while the jury exits.

1 (The following proceedings were had out of the
2 presence and hearing of the jury.)

3 THE COURT: Let's go ahead, counsel, and
4 what is the next subject? I understand there is an
5 objection to it.

6 MR. FINNEGAN: If the Court please, --

7 THE COURT: What is next, Mr. Finnegan?

8 MR. FINNEGAN: Yes, if the Court please. We
9 object to the exhibit, Deposition Exhibit 6, and the
10 testimony relating thereto which runs Pages 55 to 57.
11 This Exhibit 6 is a document dated July 26, 1984, and
12 it is entitled "Political Strategy for 1984," and we
13 don't --

14 THE COURT: Any reason why this shouldn't
15 come under my prior rulings, counsel? I know you
16 disagree with them, but is there any reason they
17 wouldn't apply?

18 MR. BRALY: Which ones are you referring to?

19 THE COURT: Deposition Exhibit 6, which is
20 Political Strategy for 1984, dated July 26, 1984.

21 MR. BRALY: Judge, if the order of the Court
22 is that there is nothing that happened after Sean
23 Marsee died that is relevant to the state of mind of
24 the tobacco company, then it comes within the ambit
25 of the Court's order.

1 THE COURT: I will sustain that objection
2 then.

3 MR. BRALY: Note our offer of the exhibit.

4 THE COURT: What is the exhibit, the trial
5 exhibit number? What would be that be?

6 MR. BRALY: Exhibit 206.

7 MR. FINNEGAN: 160.

8 MR. BRALY: 206.

9 THE CLERK: 206.

10 THE COURT: What are we doing in regard to
11 exhibits that haven't been offered?

12 THE CLERK: I don't keep them.

13 MR. BRALY: I have got them all. I have
14 been marking them "offered" and "refused."

15 (Sotto voce colloquy was here had between the
16 Court and the clerk.)

17 THE COURT: How long is the testimony going
18 to go on that? Do you know?

19 MR. FINNEGAN: It goes up to 57, Your Honor,
20 at about Line 15. And then they begin with Exhibit
21 No. 7.

22 THE COURT: Your same objection on
23 Exhibit 7?

24 MR. FINNEGAN: Well, Exhibit 7 is the same
25 objection, and in addition to that, Your Honor, the

1 Stratton bill dealt with advertisements on
2 television, as I recall. It didn't have anything to
3 do with the warning issue.

4 THE COURT: I will sustain the objection on
5 the same basis to Exhibit 7.

6 Do you have the same objection to
7 Exhibit 8?

8 MR. FINNEGAN: Yes, Your Honor. Let me just
9 check.

10 THE COURT: March 30th, 1984.

11 MR. FINNEGAN: Yes, Your Honor.

12 THE COURT: It would appear to be a similar
13 type of exhibit, and I will sustain the objection
14 to 8.

15 MR. BRALY: Let me see, what is the
16 document?

17 THE COURT: It is a Nick Buoniconti
18 memorandum about the same Stratton bill, the Stratton
19 bill or --

20 MR. BRALY: Okay. What is the date on it?

21 THE COURT: March 30th, '84.

22 MR. FINNEGAN: Your Honor, the testimony
23 relating to the next exhibit to which we object
24 begins on Page 60, Line 3, and this is a U.S. Tobacco
25 newsletter which does relate to various activities of

1 the political involvement committee, but I don't
2 believe that it has any bearing on the warning issue,
3 and it looks to be April --

4 THE COURT: It is April '85.

5 MR. JENNINGS: April, '85, yes, sir.

6 MR. FINNEGAN: If the Court please, I
7 believe this might be '83.

8 THE COURT: I believe it might be, too.

9 MR. FINNEGAN: But I believe that is after
10 the diagnosis of Sean's cancer and so, therefore, any
11 political activity at that time would be irrelevant
12 to this case, Your Honor.

13 THE COURT: What do you say about 9, Mr.
14 Braly?

15 MR. BRALY: Just a minute. Let me see the
16 exhibit.

17 (Handed to counsel).

18 MR. BRALY: Well, it talks about -- it is a
19 good example of the company's activities. For
20 instance, the third paragraph from the bottom and the
21 paragraph before in particular says, "If you hear
22 anything, please contact us." And then the next
23 paragraph says, "Legislation has been introduced in a
24 number of states on a variety of issues important to
25 us. Product sampling regulations have been suggested

1 in a number of states."

2 THE COURT: Where are you reading? I'm
3 not --

4 MR. BRALY: Reading this paragraph right
5 here (indicating). The third paragraph, the third
6 grammatical paragraph from the bottom. Just an
7 example of their organized effort to --

8 Judge, I don't care too much about the
9 document. I do want to ask him the questions.

10 THE COURT: All right. Let's go on to the
11 questions and see. We are on Page 60?

12 MR. BRALY: Yes, sir.

13 THE COURT: What do you want him to go
14 into? I am not sure --

15 MR. BRALY: I just wanted to read the short
16 series of questions there at the top of Page 60 and
17 ask him if this is another example of those periodic
18 company newsletters, one of a long series of
19 newsletters that you sent out on the subject of the
20 political action committee of the U.S. Tobacco
21 Company. He says, "We did that every quarter."

22 THE COURT: I don't mind that. The next
23 couple of pages seem kind of --

24 MR. BRALY: Your Honor, the next couple of
25 pages I am skipping. As a matter of fact, I am

1 planning on skipping all the way to Page 65.

2 MR. FINNEGAN: So you are skipping then from
3 60 to 65?

4 MR. BRALY: Yes.

5 MR. FINNEGAN: Which line?

6 MR. BRALY: Line 14.

7 THE COURT: Is this document in evidence, or
8 did I sustain the objection to the one we are talking
9 about here?

10 MR. BRALY: 27 from Bantle's exhibit.

11 MR. FINNEGAN: I thought the Court said that
12 the document would not come in, but that then there
13 would be -- I think we were discussing the testimony.

14 MR. BRALY: Which document?

15 MR. FINNEGAN: Excuse me.

16 THE COURT: What concerns me --

17 MR. FINNEGAN: If the Court please, I think
18 Mr. Braly said he wasn't too interested in the
19 document, he was more interested in the testimony. I
20 am not sure the Court has ruled on that.

21 MR. BRALY: Going back to Page 60.

22 THE COURT: 65.

23 MR. BRALY: That's where I thought we were.
24 That's what I understood on the previous document.
25 You are talking about this document that I started

1 asking questions about. That document is already in
2 evidence.

3 MR. FINNEGAN: Which exhibit is that?

4 MR. BRALY: It is Exhibit 27 to Mr. Bantle's
5 deposition.

6 MR. FINNEGAN: We had objections to Exhibit
7 27 as to the questioning, because that relates to the
8 marketing of Skoal Bandits, Your Honor.

9 THE COURT: It appears to do that.

10 MR. BRALY: Judge, there are just one or two
11 lines there that do. No. 2, the document is in
12 evidence. I don't mind deleting the specific
13 reference to Skoal Bandits particularly, but the
14 questions that follow it, for instance, at the top of
15 67.

16 See, Judge, they had been sampling this
17 Bandits for a year around the country before Sean got
18 sick, and they knew that they were going to position
19 the Bandits directly against cigarettes, and that's
20 how come the document has its reference to Bandits,
21 because they had been doing all this. I mean they
22 had been marketing in test markets all over the
23 country before Sean got sick, and so the testimony
24 right here would "'go directly against cigarette
25 smokers with Bandits.' Do you see that?

1 "Yes, sir, I do."

2 Then do you see a few lines above that?

3 THE COURT: I'm sorry. I'm sorry. Where
4 are you?

5 MR. BRALY: I am at the bottom of Page 66.

6 THE COURT: When was this document published
7 that we are talking about?

8 MR. FINNEGAN: This is the one, Your Honor,
9 that Mr. Braly showed to Mr. Bantle in his videotape
10 deposition, and Mr. Bantle said that he could find no
11 date on it, and Mr. Braly agreed that they could find
12 no date on it, but the Bandit campaign, Your
13 Honor, -- Bandits came on the market in the fall of
14 '83, and so it must have been, I would assume,
15 sometime in '83, Your Honor.

16 MR. BRALY: Judge, that document contained
17 references in the document to what they were doing in
18 response to the January 12th, 1983, letter by
19 Chairman Bantle, and had attachments to it that were
20 generated the week of January the 18th by other
21 documentary references. The company had been test
22 marketing Skoal Bandits all over the country for some
23 considerable period of time and --

24 THE COURT: What are you wanting to show?

25 MR. BRALY: Oh, I just want to show I am

1 just using it as a foundation question to the
2 question at the top of Page 67.

3 MR. FINNEGAN: If the Court please, this
4 document came in not as it related to Skoal Bandits,
5 but as it related to other matters. I believe there
6 was some testimony, there was some questions about
7 warning notices here in this line of questions. Mr.
8 Braly is asking Mr. Foley, who is a public relations
9 person, about a marketing campaign that really dealt
10 with Skoal Bandits, a product that Sean never used
11 and a product that came on the market only after he
12 was diagnosed as having cancer.

13 THE COURT: They are recommending that they
14 want to clearly establish the product, I guess that
15 is Skoal Bandits, as being a smokeless, no smoke, no
16 inhaling, is that what they are wanting to do? The
17 top of Page 67, is that what --

18 MR. BRALY: Well, actually these lines came
19 out of -- I would have to get the document, but these
20 lines came out of the document before the reference
21 to Skoal Bandits.

22 MR. FINNEGAN: What is that you are talking
23 about, Mr. Braly?

24 MR. JENNINGS: Right here (indicating).

25 Page 67.

1 THE COURT: It is Page --

2 MR. BRALY: Let me see if I can get it.

3 THE COURT: Here, I have got it, Page 179.

4 MR. BRALY: This was a longer list of things
5 that they were going to do, Your Honor. Okay.

6 THE COURT: I will overrule the objection in
7 regard to at least that first paragraph on Page 67.

8 MR. BRALY: The other thing --

9 THE COURT: Excuse me now. I'm sorry. On
10 Line 21, Page 66, I'll sustain the objection about
11 Skoal Bandits. I will allow in the next page, Page
12 67, talking about clearly established product
13 smokeless, no smoke, no inhaling.

14 MR. BRALY: Okay.

15 THE COURT: These recommendations appear to
16 be talking somewhat about Skoal Bandits and in other
17 regards about the products generally, so --

18 MR. BRALY: Judge, I want to point out one
19 thing the Court may not be familiar with is the
20 company had a portion pack product like Skoal Bandits
21 for many years prior to this. Their Good Luck
22 product was on the market. As a matter of fact, I
23 think it is what directly came out of the Lotus
24 Project, and they really hadn't pushed it and they
25 finally reformulated it and changed it all around and

1 came up with Skoal Bandits in '83. That's why you
2 see up above in there where a statement says, "Target
3 portion pack commercials directly against cigarette
4 smokers." They had an ongoing portion pack product.
5 That is just background information.

6 THE COURT: Let's omit the bottom of 66. We
7 are talking about Skoal Bandits.

8 MR. BRALY: I have got it noted.

9 THE COURT: And we will allow the top of 67.
10 The next thing then would be -- I will allow that.
11 Do you know where your next objection is?

12 MR. FINNEGAN: The Court will be pleased to
13 hear we don't have any more objections.

14 THE COURT: No more objections.

15 MR. FINNEGAN: I don't think there is
16 anything else we want to press, Your Honor.

17 THE COURT: You mean we can go home.

18 MR. FINNEGAN: We can go home.

19 MR. BRALY: Judge, I have got a list of two
20 or three matters --

21 THE COURT: All right.

22 MR. BRALY: -- to be taken up.

23 THE CLERK: What did you do with Deposition
24 Exhibit 9, the exhibit?

25 THE COURT: Excuse me, Deposition Exhibit 9?

1 MR. BRALY: This is the order with respect
2 to Conly Marsee's medical records, Your Honor, that
3 we talked about last Friday.

4 MR. FINNEGAN: We have no objection.

5 THE COURT: All right.

6 MR. BRALY: Your Honor, we have filed a
7 motion reurging this business with Doctor Rohrer and
8 Doctor Young. It has been pending now for a week or
9 ten days. I haven't seen a response. We have
10 reargued that and would like to reurge the Court on
11 that issue. I suppose that we could come back with
12 it on rebuttal, but we would sure like to have our
13 subpoena reinstated.

14 THE COURT: Well, I read your motion, and it
15 was -- I don't see any reason to change my prior
16 ruling that they weren't listed, and I think there's
17 been sufficient scientific evidence submitted in the
18 case as it is, so I don't think it will be helpful.

19 MR. BRALY: All right. I want to ask the
20 Court for clarification. I understand from -- I
21 haven't tried a case in front of you, but I
22 understand from our lawyers that you have, that you
23 have fairly routinely allowed the statements by
24 opposing sides' experts in as admissions against
25 those parties, and we would propose to do that at

1 various points with respect to Doctor Rohrer and
2 Doctor Young, and I am really inquiring as to the
3 Court's position on that.

4 THE COURT: I don't know that it has
5 actually ever come up before. You want to do that
6 now?

7 MR. BRALY: Well, no, but I mean I am going
8 to -- yes, there's actually -- I anticipate when they
9 start putting on witnesses that I am going to want to
10 do that quite frequently.

11 THE COURT: Let me think about that, and you
12 all can think about it, also.

13 MR. JENNINGS: I am not sure I understand
14 what he's talking about.

15 THE COURT: He's saying that Doctor Rohrer
16 and Doctor Young are your witnesses and statements
17 they made could be used as admissions against you.

18 MR. JENNINGS: Extrajudicial statements?

19 THE COURT: I guess their deposition
20 statements.

21 MR. BRALY: Their deposition statements.

22 MR. JENNINGS: I never heard of that
23 without, but I --

24 THE COURT: We can both think about it or
25 all think about it.

1 MR. BRALY: Somebody told me that you had
2 allowed them to do that with respect to an expert in
3 an automobile accident case.

4 THE COURT: I might have. I might have.

5 MR. BRALY: It appeared to me while it was
6 inventive lawyering, that it was probably proper
7 under the rules.

8 THE COURT: What is the admission? What are
9 you talking about, what he is saying?

10 MR. BRALY: Well, those gentlemen in their
11 depositions, for instance, the Deborah Winn Study was
12 an excellent study, one of those gentlemen in his
13 deposition stated that it was -- that good doctors
14 every day relied upon the results of laboratory
15 animal studies for making cause and effect
16 determinations in human beings, and these are all
17 things that I anticipate the experts that they bring
18 to this courtroom are going to deny, and I think it
19 would be appropriate if the jury knew that the
20 experts hired by this tobacco company were taking
21 positions that were inconsistent with each other.

22 THE COURT: Were Doctor Young and Doctor
23 Rohrer experts retained by the defendant?

24 MR. BRALY: They were retained and listed as
25 expert witnesses over a year ago, and I noticed them,

1 subpoenaed them for their depositions, and they
2 confessed that they had been retained and had been
3 told to send a bill when they got through preparing
4 and testifying.

5 MR. JENNINGS: If the Court please, I don't
6 know what the word "retained" means in the concept of
7 experts. These are people that we talked to, found
8 out what their opinions were, asked if they would be
9 willing to come in and testify. They said they
10 would. We listed them as witnesses, and we have
11 every intention of calling at least one of them.

12 THE COURT: That will eliminate the problem
13 then.

14 MR. JENNINGS: I would think so.

15 MR. FINNEGAN: Yes, Your Honor.

16 THE COURT: Okay. If it doesn't eliminate
17 the problem, we can take it up.

18 MR. BRALY: Okay. Your Honor, we would at
19 this time like to make an offer, you have already
20 ruled on this, but make an offer of proof with
21 respect to the insurance policies in this case on
22 their state of mind on their notice of the hazard.

23 THE COURT: The same ruling as previously.

24 MR. BRALY: I will present those for an
25 exhibit marker. As a matter of fact, since they are

1 voluminous, I will try to get one or two exemplars to
2 present.

3 THE COURT: All right.

4 MR. BRALY: What I think the Court is still
5 considering in the way of documents --

6 THE COURT: What I ought to do is just let
7 you admit that. Do you want it?

8 MR. BRALY: Judge, I think at least one of
9 those policies has a relevant statement in it.

10 THE COURT: You want me to let it in?

11 MR. BRALY: I wouldn't have offered it. Are
12 they objecting?

13 MR. JENNINGS: Yes.

14 THE COURT: I will let it in.

15 MR. BRALY: Don't do that, Judge.

16 THE COURT: What else?

17 MR. BRALY: I would like to get the issue
18 tested, if there was a way to test it.

19 THE COURT: Well, that would be a good way.

20 MR. BRALY: Judge, I don't want to test it
21 that way. The National Cancer Advisory Board
22 document and the consensus conference documents are
23 still awaiting rulings, as far as I know.

24 THE COURT: They are, and I have still got
25 those under consideration. I will still deal with

1 them when it is necessary.

2 MR. BRALY: We have a motion to strike their
3 answers to an interrogatory, which we filed. We
4 asked them to tell us how much money they had spent
5 for scientific research and they gave us an answer
6 and said, "Well, this is how much we spent for
7 scientific research and product development."

8 THE COURT: I didn't understand that. I
9 read it, but was there two different -- the question
10 that was posed today where it shows 7500 or 9,000 and
11 17,000, that was obviously a different interrogatory.

12 MR. BRALY: A different interrogatory. This
13 was a different period of time, as I recall, and --

14 THE COURT: It didn't make sense because it
15 showed like '75, there was several like a hundred
16 thousand dollars spent.

17 MR. BRALY: The question was phrased a
18 little bit differently, but the problem is the
19 question we asked for scientific research, they gave
20 an answer and they said, "Well, we spent this for
21 scientific research and product development." They
22 didn't answer the specific question.

23 THE COURT: But you have the answer on
24 scientific research.

25 MR. BRALY: The question covered different

1 time frames is the way I recall the question, Your
2 Honor.

3 THE COURT: I don't think it -- well, it
4 covered from '75 through '85, I believe, and --

5 MR. BRALY: It covered an earlier time
6 frame. See, it covered part of that time frame. It
7 also covered an expanded time frame, and that was the
8 reason.

9 THE COURT: Well, in any event, go ahead,
10 respond. I don't think now is the time to bring up
11 discovery disputes, so I will dispose of that in that
12 manner.

13 What else?

14 MR. BRALY: Nothing, Your Honor.

15 MR. FINNEGAN: If the Court please, what has
16 been the Court's disposition on that?

17 THE COURT: I will overrule the objection to
18 the -- I guess it was an objection to your
19 interrogatory. I am saying I don't think now is the
20 time to handle discovery disputes.

21 Anything else? We will be in recess.

22 MR. JENNINGS: Thank you.

23 (Court was recessed until 9:30 a.m., Wednesday,
24 June 11, 1986.)
25